

12  
No. 89-260-CSY  
Status: GRANTED

Title: Idaho, Petitioner  
v.  
Laura Lee Wright

Docketed:  
August 11, 1989

Court: Supreme Court of Idaho

Counsel for petitioner: Stahman, Myrna A. I.

See also:

89-296

89-478

89-5396

Counsel for respondent: Kehne, Rolf M.

Entry	Date	Note	Proceedings and Orders
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1	Aug 11 1989	G	Petition for writ of certiorari filed.
2	Sep 20 1989		DISTRIBUTED. October 6, 1989
3	Oct 4 1989	F	Response requested -- CJ, SOC.
4	Dec 13 1989		REDISTRIBUTED. January 5, 1990
6	Jan 8 1990		REDISTRIBUTED. January 12, 1990
7	Jan 16 1990		Petition GRANTED. *****
8	Jan 29 1990	G	Motion of respondent for leave to proceed further herein in forma pauperis filed.
9	Jan 29 1990	G	Motion of respondent for appointment of counsel filed.
10	Jan 31 1990		DISTRIBUTED. Feb. 16, 1990. (Motion of respondent for leave to proceed further herein in forma pauperis, and motion of respondent for appointment of counsel).
11	Feb 20 1990		Motion of respondent for leave to proceed further herein in forma pauperis GRANTED.
12	Feb 20 1990		Motion for appointment of counsel GRANTED and it is ordered that Rolf M. Kehne, Esquire, of Boise, Idaho, is appointed to serve as counsel for the respondent in this case.
13	Feb 21 1990		Record filed.
		*	Certified copy of original record, box, received.
14	Feb 23 1990		SET FOR ARGUMENT WEDNESDAY, APRIL 18, 1990. (2ND CASE)
15	Mar 1 1990		Brief amici curiae of Amer. Professional Society on the Abuse of Children, et al. filed.
16	Mar 2 1990		Brief amicus curiae of United States filed.
17	Mar 2 1990		Joint appendix filed.
18	Mar 2 1990		Brief of petitioner Idaho filed.
19	Mar 2 1990		Brief amici curiae of Commonwealth of Pennsylvania, et al. filed.
20	Mar 12 1990	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Mar 23 1990		CIRCULATED.
21	Mar 26 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
24	Mar 30 1990	X	Brief amicus curiae of ACLU filed.
23	Apr 2 1990	X	Brief amicus curiae of National Assn. of Criminal Defense Lawyers filed.
25	Apr 4 1990	X	Brief of respondent Laura Lee Wright in opposition filed.
26	Apr 11 1990	X	Reply brief of petitioner Idaho filed.

No. 89-260-CSY

Entry	Date	Note	Proceedings and Orders
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27	Apr 18 1990	ARGUED.	
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89-2 60①

Supreme Court, U.S.

FILED

AUG 11 1989

JOSEPH F. SPANIOL, JR.  
CLERK

No. 89-\_\_

In The  
**Supreme Court of the United States**  
October Term, 1989

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THE STATE OF IDAHO,

*Petitioner,*

vs.

LAURA LEE WRIGHT,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT OF IDAHO**

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### QUESTION PRESENTED FOR REVIEW

Whether the "indicia of reliability" and "particularized guarantees of trustworthiness" mandated by the Sixth Amendment Confrontation Clause of the United States Constitution require that the hearsay statement of a very young victim of sexual abuse to an examining pediatrician be excluded unless the prosecution establishes that (a) the interview was either audio or videotaped; (b) leading questions were not used; and (3) the examining pediatrician conducting the interview did not have any preconceived idea of what the child should be disclosing.

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## OPINION BELOW

The opinion of the Idaho Supreme Court, not yet reported appears as Appendix A. As Appendix B the state is providing the opinion of the Idaho Supreme Court in the companion case of *State v. Giles*, \_\_\_ Idaho \_\_\_, 772 P.2d 191 (1989).

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## JURISDICTION

The opinion of the Idaho Supreme Court was issued on June 13, 1989. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The judgment below is not based on an independent and adequate state ground. The Idaho Supreme Court relied entirely upon the Confrontation Clause of the Sixth Amendment to the United States Constitution in evaluating the defendant's right to confront witnesses against her. Idaho does not have a state constitutional confrontation clause.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF EVIDENCE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

[Rights of the accused.] In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

Idaho Code § 19-3024 provides:

19-3024. Statements by child. - Statements made by a child under the age of ten (10) years describing any act of sexual abuse, physical

abuse, or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

1. The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and

2. The child either:

- (a) Testifies at the proceedings; or

- (b) Is unavailable as a witness. A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Provided that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.

Statements may not be admitted unless the proponent of the statements notifies the adverse party of his intention to offer the statements and the particulars of the statements sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements.

Rule 803, Idaho Rules of Evidence provides:

Rule 803. Hearsay exceptions; availability of declarant immaterial. – The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

....

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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#### STATEMENT OF THE CASE

Laura Lee Wright and Robert L. Giles were jointly charged, tried and convicted on two counts of lewd conduct committed on Wright's two daughters, who were five-and-one-half and two-and-one-half years old when the crimes were committed. Wright and Giles filed separate appeals.

On appeal Wright asserted that admitting the testimony of the pediatrician as to a statement made to him by the two-and-one-half year old victim violated the rules of evidence and her rights under the Confrontation Clause of the Sixth Amendment. Prior to deciding Wright's appeal, the Idaho Supreme Court decided the



appeal of her codefendant, Giles, in which the only issue concerned the admissibility of the testimony of a pediatrician as to hearsay statements of the two-and-one-half year old under the Idaho Rules of Evidence (I.R.E.). The court held that the pediatrician's testimony was properly admitted under Rule 803(24), I.R.E., because the statements had sufficient indicia of reliability and circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions. *State v. Giles*, \_\_\_ Idaho \_\_\_, 772 P.2d 191, 194-195 (1989) (Appendix B). Subsequently, a three member majority of the Idaho Supreme Court held that although the testimony was properly admitted under Rule 803(24), I.R.E., its admission was "in violation of the standards applicable to the Confrontation Clause of the United States Constitution." *State v. Wright*, No. 17033, slip op. at 2 (Idaho, June 13, 1989) (Appendix A).

The background and facts surrounding the sexual abuse are set forth as follows in *State v. Giles*, \_\_\_ Idaho \_\_\_, 772 P.2d 191 (Idaho 1989) (Appendix B):

The older daughter was born April 1, 1981, to Laura Wright and Louis Wright, who separated from one another on September 22, 1982. Her parents reached an informal agreement whereby each parent would have custody of their daughter for consecutive 6-month periods. The younger daughter was born April 4, 1984, to Laura Wright and the defendant Robert Giles. She was living with them at the time this lewd conduct was committed.

On October 7, 1986, Louis Wright took custody of the older daughter pursuant to the agreement. On November 8, 1986, the older daughter revealed to Cynthia Goodman, Louis Wright's girlfriend, that she had been sexually

abused by her mother and Giles. The older daughter also stated that her younger half-sister had been sexually abused as well.<sup>1</sup> The following day, November 8, 1986, Goodman reported the sexual abuse of the two girls to the police. Examinations of the older daughter that day by three doctors revealed an abrasion near the vaginal opening, no evidence of a hymenal ring, a fairly large bruise on the left upper leg and a slightly larger vaginal opening than would be expected for a girl her age. One of the three, Dr. Jambura, a pediatrician with extensive experience in child abuse cases, testified that it was "highly possible that vaginal penetration had been occurring on relatively regular basis."

That same day, the younger daughter was taken from her mother [Wright] and Giles and into custody by a police officer and a social worker. The next day, Dr. Jambura examined the younger daughter. His examination revealed some redness and bruises in the early stages of healing on the inner surface of the labium majora and labium minora and some scarring on the back portion of the vagina. The healing area around the vagina was inflamed and swollen. Dr. Jambura explained that it is very difficult to bruise the labium minora and the bruising on the surfaces of both labia suggests that forcible contact was made with the inner genital area. He testified that these injuries were "strongly suggestive of sexual abuse with vaginal contact." Dr. Jambura believed the trauma occurred approximately 2-3 days prior to the examination.

During Dr. Jambura's examination of the younger daughter, the two engaged in conversation. Over defense objection, Dr. Jambura testified at trial regarding this conversation:



A. [By Dr. Jambura] . . . She started to carry on a very relaxed animated conversation, I then proceeded to just gently start asking questions about, "Well, how are things at home," you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, "Do you play with daddy? Does Daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" And again we then established what was meant by pee-pee, it was a generic term for genital area.

Q. [By the prosecutor] Before you get into that, what was, as best you recollect, what was her response to the question "Do you play with daddy?"

A. Yes, we play - I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And "Does daddy play with you?" Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

A. Yes.

Q. What did you observe?

A. She would not - oh, she did not talk any further about that. She would not elucidate what exactly - what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.

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<sup>1</sup> At trial, held May 6-12, 1987, the older daughter testified that Giles had intercourse with the younger sister while Laura [Wright] held the younger sister's legs and covered her mouth so she wouldn't scream.

771 P.2d at 192-193.

As the Idaho Supreme Court noted in footnote 1, the older sister testified at trial concerning the sexual abuse of her younger sister. She testified regarding the "private touching" which happened to her and to her younger sister and the fact that the "private touching" of her

younger sister occurred while all four individuals, the defendants and both young girls, were in her bedroom. The older daughter testified that while her legs and mouth were held by her mother, Wright, Giles would be "pumping me." (Trial Tr. at 214-216, provided as Appendix C.)

In admitting Dr. Jambura's testimony concerning the statements of the two-and-one-half year old victim, the trial court explained, as set forth in *State v. Giles, supra*:

In this case, of course, there is physical evidence to corroborate that sexual abuse occurred. It also would seem to be the case that there is no motive to make up a story of this nature in a child of these years. We're not talking about a pubescent youth who may fantasize. The nature of the statements themselves as to sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up. This is simply not the type of statement, I believe, that one would expect a child to fabricate.<sup>2</sup>

We come then to the identification itself. Are there any indicia of reliability as to identification? From the doctor's testimony it appears that the injuries testified to occurred at the time that the victim was in the custody of the Defendants. The [older daughter] has testified as to identification of perpetrators. Those - the identification of the perpetrators in this case are persons well known to the [younger daughter]. This is not a case in which a child is called upon to identify a

stranger or a person with whom they would have no knowledge of their identity or ability to recollect and recall. Those factors are sufficient indicia of reliability to permit the admission of the statements.

Under these circumstances, the statements have circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions. Furthermore, the interests of justice and the general purposes of evidence were best served by admission of these statements.

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<sup>2</sup> We note, as an additional indicia of reliability, the absence of a custody battle over the younger daughter. Unsubstantiated accusations of sexual abuse sometimes arise when one parent seeks to terminate custodial rights of the other parent. The child's coached remarks may be sought for use as an evidentiary weapon by an unscrupulous parent. Testimony given under these circumstances may be unreliable and ruled inadmissible. Concern over such abuse is not present here, however. The younger daughter was taken directly from the custody of both parents and was then examined by Dr. Jambura when the statements were made.

772 P.2d at 194-195. The Idaho Supreme Court in *Giles* upheld the trial court's determination that, under these circumstances, the pediatrician's testimony contained sufficient indicia of reliability and circumstantial guarantees of trustworthiness to be admissible under the catch-all hearsay exception, Rule 803(24), I.R.E.

In holding that the admission of Dr. Jambura's testimony violated Wright's right to confront witnesses

against her, the three member majority in *Wright* explained:

*Hearsay which falls into a well-established exception is usually, but not always, reliable enough to satisfy confrontation. Other hearsay, such as the declarations of the younger Wright girl admitted in the "catch-all" provision of Rule 803(24) I.R.E., should be considered "presumptively unreliable and inadmissible for Confrontation Clause purposes" absent a "showing of particularized guarantees of trustworthiness." Lee v. Illinois, 106 S.Ct. 2056, 2064 (1986).*

*Wright*, slip op. at 5-6. (Emphasis added by the Idaho Supreme Court.) The three member majority then enumerated what they saw as the minimal criteria demanded of such testimony by the Confrontation Clause of the Sixth Amendment to the United States Constitution:

We fail to see how Wright's right to face-to-face confrontation escaped violation in this event of admission of inculpatory hearsay testimony which did not fall within any of the traditional exceptions and which was brought into evidence as a result of an interview lacking procedural safeguards. The record does not provide the required showing of particularized guarantees of trustworthiness supporting the doctor's statement of the young girl's declarations. Instead, the hearsay declarations of the younger Wright girl are not trustworthy because of Dr. Jambura's interview technique: *the questions and answers were not recorded on video tape for preservation and perusal by the defense at or before trial; and, blatantly leading questions were used in the interrogation. Further, the statements lack trustworthiness because this interrogation was performed by someone with a preconceived idea of what*

*the child should be disclosing.* Because of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura, we conclude that Dr. Jambura's testimony regarding the younger Wright girl's declarations lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause.

The doctor's interview was conducted without procedural safeguards sufficient to provide meaningful cross-examination or review as to its integrity.

*State v. Wright*, slip op. at 6 (emphasis added).

While apparently accepting the trial court's determination that sufficient indicia of reliability existed to admit such testimony under the catch-all hearsay exception of Rule 803(24), I.R.E., the Idaho Supreme Court in *Wright* explained that the Sixth Amendment's Confrontation Clause demands more:

By no means can one say that the "particularized guarantees of trustworthiness" required to withstand objection pursuant to the Confrontation Clause are demonstrable in this case. Where courts have admitted the hearsay declarations of child witnesses, statements were overwhelmingly found to be reliable only because they were excited utterances (Rule 803(2) I.R.E.) or part of the *res gestae* . . . . Conversely, courts examining admissibility of incompetent witnesses' declarations occurring appreciably after the incident generally exclude the declarations, . . . .

Dr. Jambura's testimony as presented lacked particularized guarantees of trustworthiness



and, in fact, is fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate.

*State v. Wright*, slip op. at 12-13.

The trial court found sufficient indicia of reliability for the admission of the statement in which the younger girl responded affirmatively when Dr. Jambura asked if daddy touched her with his "pee-pee." The indicia of reliability included (1) the physical evidence of sexual penetration, (2) the testimony of her five-year old sister who was an eye-witness to the sexual abuse of the younger girl and who testified at trial, (3) the fact the two-and-one-half year old victim had no motive to make up a story such as this, (4) the fact this is not the type of statement one would expect such a young child to fabricate, and (5) the fact the two-and-half year old victim had been taken directly from the custody of Wright and Giles and then was examined by Dr. Jambura. The Idaho Supreme Court also held that sufficient indicia of reliability existed for admission of the questioned testimony into evidence pursuant to Rule 803(24). *State v. Giles*, 772 P.2d at 194-95.

Despite this, the *Wright* majority held that admission of Dr. Jambura's testimony concerning the statements made to him during his interview of the two-and-one-half year old victim, none of which implicated Wright, violated Wright's sixth amendment right to confrontation of witnesses. The court explained that sufficient "particularized guarantees of trustworthiness" did not exist because (1) the doctor's examination and interview of the two-and-one-half year old victim was neither video nor audio taped, (2) Dr. Jambura asked the two-and-one-half

year old victim leading questions including, "Does your daddy touch you with his pee-pee?", and (3) Dr. Jambura "may well have had preconceptions" in that he had examined the victim's older sister the previous day after she complained of being sexually abused. *State v. Wright*, slip op. at 12. Holding that admission of this evidence did not constitute harmless error, the court reversed the conviction of Wright for sexual abuse of her two-and-one-half year old daughter. *Id.* at 13-14.

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#### REASONS FOR GRANTING THE WRIT

The State of Idaho submits that the Idaho Supreme Court has decided a federal question which presents an issue of major significance. What accommodations must be made to preserve a defendant's sixth amendment right to confront witnesses against her, and at the same time provide the jury with the necessary relevant evidence to permit them to find the truth, is a federal question of significant proportion.

Sexual abuse of very young children has become almost commonplace in the United States. As Justice O'Connor observed in her concurring opinion in *Coy v. Iowa*, 487 U.S. \_\_\_, 101 L.Ed.2d 857, 868, 108 S.Ct. 2798, 2803 (1988): "Child abuse is a problem of disturbing proportions in today's society." And Justice Blackmun noted in his dissent:

Between 1976 and 1985, the number of reported incidents of child maltreatment in the United States rose from .67 million to over 1.9 million, with an estimated 11.7 percent of those cases in 1985 involving allegations of sexual abuse.

101 L.Ed.2d at 873, 108 S.Ct. at 2808. Especially when the victim of the sexual abuse is only two-and-one-half years old, the defendant's right to confront witnesses against him/her must be weighed against the compelling state interest in protecting child victims of sexual abuse.<sup>1</sup> The legislatures and the courts throughout the United States have been confronted with the difficult issue of weighing the defendant's sixth amendment right to confront witnesses against her, against the compelling state interest in protecting child victims of sexual assaults.

This Court has recognized that competing interests, if closely examined, may warrant dispensing with confrontation at trial. *See, Ohio v. Roberts*, 448 U.S. 56, 64, 65 L.Ed.2d 597, 100 S.Ct. 2531 (1980); *Mattox v. United States*, 156 U.S. 237, 243, 39 L.Ed. 409, 15 S.Ct. 337 (1894). As explained in *Ohio v. Roberts*:

This Court, in a series of cases, has sought to accommodate these competing interests. True to the common-law tradition, the process has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions.

448 U.S. at 64, 65 L.Ed.2d at 607, 100 S.Ct. at 2538. The State of Idaho submits that the time has now come to draw on the new experiences which have been felt in the courtrooms across the nation and which many state legislatures have attempted to deal with concerning society's

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<sup>1</sup> Protecting the physical and psychological well-being of children is a compelling state interest. *New York v. Ferber*, 458 U.S. 747, 756-757, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607, 73 L.Ed.2d 248, 102 S.Ct. 2613 (1982).

responsibility in adequately handling the sexual abuse of very young children. As a result of the huge increase in reported sexual abuse of very young children and the resulting increase in criminal prosecutions, courts and legislatures have established methods to facilitate the admission of crucial evidence into court. One method provides for the admission of reliable hearsay statements of the victim of sexual abuse, while at the same time considering the defendant's sixth amendment right to confront witnesses against her.<sup>2</sup>

In *Ohio v. Roberts*, *supra*, this Court explained:

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. at 66, 65 L.Ed.2d at 608, 100 S.Ct. at 2539.

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<sup>2</sup> Many states have enacted statutory hearsay exceptions to provide for admission of victim's statements. *See, e.g.,* Colo. Rev. Stat. § 13-25-129 (Supp. 1986) (enacted 1983); Ind. Code Ann. § 35-37-4-6 (Burns Supp. 1984) (enacted 1984); Idaho Code § 19-3024 (1987) (enacted 1986); Kan. Stat. Ann. § 60-460(dd) (1983) (enacted 1982); Minn. Stat. § 595.02(3) (1988) (enacted 1984); S.D. Codified Laws Ann. § 19-16-38 (1987) (enacted 1984); Utah Code Ann. § 76-5-411 (Supp. 1989) (enacted 1983); Wash. Rev. Code Ann. § 9A.44.120 (1988) (enacted 1982).



Some hearsay statements of a sexually abused child clearly fall within an established exception to the hearsay rule, such as the excited utterance exception. Even this exception has been expanded to accommodate the circumstances of child sexual abuse where the report may be made after a lapse of time. See *State v. Parker*, 112 Idaho 1, 730 P.2d 921 (1986), *reh'g denied* (1987); *U.S. v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981); *U.S. v. Nick*, 604 F.2d 1199 (9th Cir. 1979). Likewise, the medical exception to the hearsay rule has been liberally used in sexual abuse prosecutions. *State v. Nelson*, 138 Wis. 2d 418, 406 N.W.2d 385 (Wis. 1987), *habeas corpus granted*, *Nelson v. Ferrey*, 688 F.Supp. 1304 (E.D. Wis. 1988), *rev'd*, 874 F.2d 1222 (7th Cir. 1989), *reh'g denied*, (1989); *State v. Vosika*, 830 Or. App. 298, 731 P.2d 449 (1987), *on reconsideration*, 85 Or. App. 148, 735 P.2d 1273 (1987); *State v. Bellotti*, 383 N.W.2d 308, 312 (Minn. Ct. App. 1986), *review denied*, (1986); *United States v. Renville*, 779 F.2d 430 (8th Cir. 1985).

Sexual abuse, especially of very young children, is often done by an individual in a position of trust over the victim and often is done over a period of time.<sup>3</sup> Because of this, when the abuse is finally reported it is often reported in a manner which does not fit within one of the established exceptions to the hearsay rule. Legislatures across the country have responded to this dilemma by enacting statutory hearsay exceptions, while courts have

<sup>3</sup> MacFarlane, "Sexual Abuse of Children," in *Victimization of Women* 81 (J.Chapman & M.Gates eds. 1978); J. Herman, *Father-Daughter Incest* (1981); S. Butler, *The Conspiracy of Silence* (1978).

reacted by admitting a child victim's hearsay statement through a somewhat liberal application of the spontaneous exclamation exception, the medical treatment exception, or pursuant to the catch-all hearsay exception, such as Rule 803(24), I.R.E. Yet, an acceptable solution to the problem has not been found, unless these statutory hearsay exceptions and hearsay admitted pursuant to the catch-all hearsay exception survive scrutiny when measured against the defendant's sixth amendment right to confront witnesses.

As this Court set forth in *Ohio v. Roberts*, where a "showing of particularized guarantees of trustworthiness" is made, admission of the child victim's hearsay may comply with the defendant's sixth amendment right to confront witnesses. But, at issue remains what an adequate showing of "particularized guarantees of trustworthiness" is. In the case at hand the trial court admitted the hearsay after finding sufficient indicia of reliability. The Idaho Supreme Court agreed that sufficient indicia of reliability and particularized guarantees of trustworthiness existed for admission of the same testimony into evidence pursuant to Rule 803(24). *State v. Giles*, 772 P.2d at 194-95. Despite meeting the admissibility requirements of the catch-all hearsay exception, the Idaho Supreme Court held that admission of Dr. Jambura's testimony concerning the statements made to him during his interview of the two-and-one-half year old victim, none of which implicated Wright, violated Wright's sixth amendment right to confrontation of witnesses.

The Idaho Supreme Court essentially held that before the hearsay statement of a victim of child sexual abuse



may be admitted into evidence, the Confrontation Clause of the Sixth Amendment to the United States Constitution requires that "procedural safeguards sufficient to provide meaningful cross-examination or review as to its integrity" must be followed. According to the court, these minimal safeguards required by the Confrontation Clause include: (1) the state must provide the defendant with either an audio or video tape of the interview in which the statement was made, (2) no leading questions may be used in the interview of the child sexual abuse victim, and (3) the interview must be conducted by an individual who has no preconceived ideas of what the child should be disclosing.

This holding of the Idaho Supreme Court stands normal Confrontation Clause jurisprudence on its head. The essence of such jurisprudence in the context of hearsay evidence that does not fall "within a firmly rooted hearsay exception" is the conduct of a "case-by-case inquiry into reliability." *Coy v. Iowa*, 487 U.S. \_\_\_, 101 L.Ed.2d at 875, 108 S.Ct. at \_\_\_ (Justice Blackmun, dissenting). This inquiry had already been made and the testimony found sufficiently reliable to be admissible under the catch-all hearsay exception. The Idaho Supreme Court nonetheless felt compelled to strike the testimony and overturn the conviction because of what it understood to be three additional *per se* requirements of the Confrontation Clause.

Although the state has been unable to find any other appellate decision which has imposed such stringent requirements on the admission into evidence of the hearsay statement of a victim of child sexual abuse, no clear

rule of law presently exists providing guidance for the admission into evidence of such evidence.

The State of Idaho submits that the time has come for this Court to provide guidance as to what "indicia of reliability" and what "particularized guarantees of trustworthiness" must be shown to exist, in a child sexual abuse case, to comply with the defendant's sixth amendment right to confront witnesses against her.

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### CONCLUSION

The State of Idaho prays that its petition for writ of certiorari be granted and that oral argument be scheduled, or that its petition for writ of certiorari be granted and the decision of the Idaho Supreme Court be summarily reversed.

DATED this 11th day of August, 1989.

Respectfully submitted,

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App. 1

APPENDIX A

1989 Opinion No. 85

IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 17033

STATE OF IDAHO	)	
Plaintiff-respondent,	)	Boise, November 1988
	)	Term
v.	)	
	)	Filed: June 13, 1989
LAURA LEE WRIGHT,	)	
Defendant-appellant.	)	Frederick C. Lyon, Clerk

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada. Honorable Gerald F. Schroeder, District Judge.

Appeal from conviction of count of lewd conduct with a minor under sixteen. Pediatrician testified at trial to hearsay declarations of two-and-one-half year old alleged sexual abuse victim identifying co-defendants as perpetrators during interview. Testimony erroneously admitted in violation of standards applicable to the Confrontation Clause. *Conviction reversed and case remanded for new trial consistent herewith.*

Rolf M. Kehne, Boise, Idaho, attorney for the appellant.

Hon. Jim Jones, Attorney General, Boise, Idaho attorney for respondent. Myrna A.I. Stahman, Deputy Attorney General, argued.

HUNTLEY, J.

Laura Lee Wright appeals her conviction on one count of lewd conduct with a minor under sixteen, felony, I.C. § 18-1508. Wright was jointly charged with Robert L. Giles who was also convicted on two counts of lewd conduct with a minor for having jointly committed the stated crimes against her two daughters, aged 5½ (older daughter) and 2½ (younger daughter) when the crimes were charged. Wright was found to have held her daughters down to permit co-defendant, Giles, to have sexual intercourse with each. Giles and Wright were jointly tried and convicted by the same jury. Wright was sentenced to twenty years, indeterminate, on each count, the terms to run concurrently.

Wright and Giles each filed a separate appeal seeking reversal of their conviction on the count charged with respect to the acts against the younger daughter. This Court filed an opinion in *State v. Giles*, Supreme Court No. 17034, \_\_\_ Idaho \_\_\_, \_\_\_ P.2d \_\_\_ 1989) on March 30, 1989, wherein a majority affirmed Giles' conviction notwithstanding his argument that admission of Dr. Jambura's testimony violated the rule against hearsay. The majority opinion in *Giles* held that the same testimony challenged herein was correctly admitted into evidence under I.R. E. 803(24) pursuant to the authority of *State v. Hester*, 114 Idaho 668, 760 P.2d 27 (1988).<sup>1</sup> Unlike Wright, Giles did not raise the question of violation of the

<sup>1</sup> The author continues to subscribe to the view articulated in his "concurrency in the result" in *Giles* with regard to the hearsay rule, but acknowledges that the majority view expressed in *Giles* is now the law of this state and is, therefore, controlling herein.

Confrontation Clause of the Constitution of the United States and the majority was of the opinion that this Court could not raise that issue on its own motion. The issue of error under the Confrontation Clause is appropriately raised in the instant case and we hold that the trial court erred in admitting this testimony in violation of the standards applicable to the Confrontation Clause of the United States Constitution.

## I.

## TESTIMONY

The trial court permitted Dr. John Jambura, a pediatrician who conducted a physical examination of the younger Wright girl and asked her whether sexual abuse occurred between her and the two co-defendants, to testify concerning hearsay statements made to him by the younger Wright daughter. This evidence was admitted over the defendants objection. The younger Wright daughter was three years old at the time of the trial and only two-and-one-half years old at the time of the out-of-court statements to Dr. Jambura. She did not testify at trial. After the judge conducted a voir dire examination of the child, he asked both counsel if they agreed that she was not capable of communicating to the jury and both agreed she was not competent to testify.

Dr. Jambura examined and interviewed the younger daughter and was allowed to testify to her responses to four questions, his testimony being:

.... "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" And again we



then established what was meant by pee-pee, it was a generic term for genital area.

Q. Before you get into that, what was, as best you recollect, what was her response to the question "Do you play with daddy?"

A. Yes, we play - I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And "Does daddy play with you?" Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

She allegedly then volunteered that her daddy "... does do this with me, but he does it a lot more with my sister than with me."

The trial court admitted these statements under Rule 803(24) I.R.E. which provides:

Rule 803. Hearsay exceptions; availability of declarant immaterial. - The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

....

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions

but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

## II. CONFRONTATION

Wright argues that even if admission of the doctor's testimony was not erroneous under the rule against hearsay, it was, nonetheless, erroneous because it violated the dictates of the Confrontation Clause of the United States Constitution. The sixth amendment to the United States Constitution provides in part that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This provision is applicable to the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 U.S. 1065, 1068 (1965).

The purpose of the right of confrontation is to "advance 'the accuracy of the truth-determining process in criminal trials'" by allowing only reliable evidence to be admitted. *Tennessee v. Street*, 471 U.S. 409, 415, 105 S.Ct.

2078, 2082 (1985), (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). "The right to confront and cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee v. Illinois*, 106 S.Ct. at 2056, 2062 (1986).

The Confrontation Clause objective of reliability is met by cross-examination, an opportunity for the jury to observe the witness' demeanor, and face-to-face confrontation between the witness and the accused. "[A] major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him." *Pointer v. Texas*, 380 U.S. at 406-07. Concerning the opportunity for the jury to observe demeanor, the Supreme Court mentioned the importance of live testimony, when a witness stands "face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 15 S. Ct. 337, 339 (1895). The purpose of confrontation between an accuser and defendant is that it "undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and is present at trial." *Ohio v. Roberts*, 448 U.S. 56 at 63 n. 6, 100 S. Ct. 2531, 2538. Only last year, the United States Supreme Court found that the sexual assault defendant's right to face-to-face confrontation was violated by permitting two 13-year-old girls to testify behind a large screen that enabled Coy to dimly perceive the witnesses but rendered them unable to see him. *Coy v. Iowa*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2798, 101 L.Ed.2d 857, 43 Cr.L. 3226, 56 L.W. 4932 (1988).

The hearsay rules and the Confrontation Clause have similar policy objectives. *California v. Green*, 399 U.S. 149, 155, 90 S. Ct. 1930, 1933 (1970). However, they are not coextensive. Some out-of-court declarations which are admissible under hearsay exceptions may violate confrontation rights. E.g., *Green*, 399 U.S. at 153-156; *Bruton v. United States*, 391 U.S. 123, 188 S. Ct. 1620 (1968). The impact of the Confrontation Clause upon the admissibility of hearsay is difficult to analyze. "Few tasks in criminal evidence are more perplexing than to describe the effect of the Confrontation Clause of the sixth amendment upon the hearsay doctrine." 4 LOUSELL & MUELLER, *FEDERAL EVIDENCE* § 418 at 123 (1970). *Hearsay which falls into a well-established exception is usually, but not always, reliable enough to satisfy confrontation. Other hearsay, such as the declarations of the younger Wright girl admitted in the "catch-all" provision of Rule 803(24) I.R.E. should be considered "presumptively unreliable and inadmissible for Confrontation Clause purposes" absent a "showing of particularized guarantees of trustworthiness."* *Lee v. Illinois*, 106 S.Ct. 2056, 2064 (1986). (Emphasis added.)

We fail to see how Wright's right to face-to-face confrontation escaped violation in this event of admission of inculpatory hearsay testimony which did not fall within any of the traditional exceptions and which was brought into evidence as a result of an interview lacking procedural safeguards. The record does not provide the required showing of particularized guarantees of trustworthiness supporting the doctor's statement of the young girl's declarations. Instead, the hearsay declarations of the younger Wright girl are not trustworthy



because of Dr. Jambura's interview technique: the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and, blatantly leading questions were used in the interrogation. Further, the statements lack trustworthiness because this interrogation was preformed by someone with a preconceived idea of what the child should be disclosing. Because of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura, we conclude that Dr. Jambura's testimony regarding the younger Wright girl's declarations lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause.

The doctor's interview was conducted without procedural safeguards sufficient to provide meaningful cross-examination or review as to its integrity. To assess the impact of Dr. Jambura's interview techniques, it is necessary to review some precepts of developmental psychology.

Children's cognitive abilities do not merely increase quantitatively. They go through recognizable stages which have been recognized as qualitatively different. Childhood cognition is fundamentally different from thinking and recalling in adults. *See e.g., J. Piaget, THE LANGUAGE AND THOUGHT OF THE CHILD*. (1926). Some authorities state that most of the development of accurate recall skills occurs between ages five and ten. Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory* 40 J. SOC. ISSUES 33, 34-36 (1984). Younger children have memories, but may lack the ability to recall and relate them. *Id.*; Loftus & Davies,

*Distortions in the Memory of Children*, 40 J. SOC. ISSUES, 51 54 (1984). Leading questions, such as those asked by Dr. Jambura, are tempting because they may serve to help a child recall. However, they are extremely dangerous as a means leading to admissible evidence at a criminal trial (as opposed to as an aid in therapy for the child) because of the nature of children's memory. Even adult's memory can be tainted to the point that their actual testimony is deemed too unreliable to be admitted without offense to due process. Examples include the tainted identification resulting from an unduly suggestive lineup or the effect of hypnosis. *Cf. State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984) (in determining question of admissibility of hypnotically induced testimony, circumstances surrounding hypnotic sessions should be examined in light of suggestive safeguards, and it should then be determined if, in the totality of circumstances, it appears that testimony proposed is sufficiently reliable to merit admission). The problem of tainted memory is much more severe in young children. *See e.g., Cohen & Harnick, The Susceptibility of Child Witnesses to Suggestion*, 4 LAW & HUMAN BEHAVIOR 210 (1980).

The risk with young children is that they may be unable to distinguish between a memory of something which actually happened from a memory of something they imagine happening. *See e.g., Johnson & Foley, supra*, at 45. If an interview technique leads a child to imagine an event, the child's memory of that imagined event will be indistinguishable from memories of events which the child actually experienced. Loftus & Davies, *supra*, at 52-53. Once this tainting memory has occurred, the problem is irremediable. That memory is, from then on, as real



to the child as any other. This "confabulation" is precisely the problem with hypnotically enhanced memory discussed by this Court in *Iwakiri*, 100 Idaho 618. See, Loftus & Davies, *supra*, at 65; Stafford, *The Child as a Witness*, 37 Wash. L. Rev. 303 at 309 (1962).

In addition to leading questions, other circumstances can lead to memory confabulation. A person the child perceives to have high status will more easily influence the child to accept suggestions. It is therefore critical that neither the interviewer nor anyone else present have preconceptions. Goodman & Hegelson, *Child Sexual Assault: Children's Memory & the Law*, 40 U. Miami L. Rev. 181, 187-97 (1985).

The research discussed in the literature cited above is consistent with the testimony of Dr. Thurber, an expert in child psychology who testified for the defendant at trial.

A. Well, children who have a mental age of five years and chronological age of five years would have difficulty distinguishing fantasy from reality. The work of John Piaget, the great Swiss Psychologist, indicates that children of five, on the average, are unable to distinguish things that they have thought about from things that they've actually encountered in a world of reality.

Children at the age of five years mentally have problems in retrieving memories, so memories that are once stored have - are not consolidated, so to speak, are placed in abstract conceptual categories. The information may be there, it's just hard to retrieve it or bring it forth. And for these reasons children of this age level are very prone to respond to such things as leading questions. A question that implies information that was not actually the world of reality may

become part of memory of a child, believes that that information fully occurred in the world of reality [sic].

What I'm saying is that a child who was five years eight months chronologically, but has a mental age of 15 months or so below that, will have even more severe problems in terms of retrieving memories and prone to be influenced by leading questions, will have problems distinguishing imagery, what they think about from the actual outside world.

Q. Do I understand you to be saying then, Dr. Thurber, that - correct me if I'm wrong, that were I to discuss with a child a particular action and event of that age that the child had not, in fact, experienced and discussed at some length, and asked the child to repeat it, that a child may have trouble distinguishing whether that actually happened to them or whether they've heard about it?

A. That's correct. It's especially the case in events that imply action. So if you describe for a four or five-year-old child some kind of an action-related behavior on the part of other people, the child has particular problems in distinguishing the discussion, the information presented verbally, from an actual experience and may confuse the two. And this comes from a lot of recent research at New York University in regard to children and fantasy versus reality.

Q. Now, the child that confuses that what they've heard with what actually happened to them, and they recite what they've heard or report what they've heard is that child lying in the normal sense that we understand it?

A. Absolutely not. Lying in the normal sense involves some kind of deception. To young children about the age of five on the average what

is in their memory is true regardless of how that information got into the memory banks.

Q. If a child were to be reciting information that is true, even if it's not, in fact, happened something that they're heard and they've taken into their minds as being true, is that likely to affect how they react in the telling of it; their body positions, their outward acting, observations?

A. If a child is coming forth with what has been stored in memory, their nonverbal behaviors will be very consistent with that information. That is, they wouldn't be able to distinguish from what source the information was stored.

....

Q. What are some of the pitfalls or dangers to be aware of to be sure that you're gathering accurate data from a child?

A. My first response is they are probably too numerous to mention. But, first and foremost, the examiner, the evaluator, the interrogator must be aware of personal biases and how those biases can be reflected in an interview situation. *The primary consideration would be not to ask what are termed closed-ended questions, questions that can be asked - pardon me, questions that can be answered yes or no. It has been found that an interviewer's pre-existing assumptions and biases can be reflected in these questions and can guide children into the responses that the interviewer wants to see.*

So we ask open ended questions, questions that cannot be answered yes or no. It has also been found that interviewers can very subtly reward the responses they want to see, and can shape the answers of children. One of my colleagues in

the Portland area, Bill McGeiver has found that simply by nodding the head and saying "um-hum" he can shape, so to speak, gradually shape behaviors in young children that border on the sexually bizarre, and these are children who have had no sexual abuse in their background. Now these are also very young children, I might mention, from the four to six-year-old range.

So, an interviewer must be very, very aware that very subtle cues such as a nod or saying "um-hum" can reward young children, in effect, and can shape and determine the responses that the interviewer is going to see.

Attention, as such, is also a very important factor. If an interviewer has decided that a child has been sexually abused, for example, that interviewer will likely attend when the child responds in a way that is consistent with the assumptions, and will not attend if the child responds in a way that is contrary to the pre-existing assumption.

So, I think of the important issues here, the key ones are open ended questions, be aware of pre-existing biases, do not respond in subtle ways that might reward the responses that you want to see. We could go on and on. There are multitudinous problems in interviewing children.

One of my colleagues who - from whom I received training at the University of Oklahoma Medical School has recently published a book on the investigation and treatment of child abuse, and is probably the nation's authority at this time, C. Eugene Walker, and his position is that in initially approaching a child that presumably has been abused, that you use a very nonstructured kind of situation. You don't even ask questions. Bring the child in a room with many toys, many writing implements, papers. Let the child just behave spontaneously and see



what comes of this kind of a situation without attempting to prompt or influence the child by questions. And I would strongly support that approach because of the many possibilities of bias in terms of our questions.

Q. That sounds like a difficult task then to be certain not to inject anything into the interview.

A. Very much so.

Q. How can one guard – the best techniques for guarding against that so we can go back and determine whether an interviewer has skewed the information or injected their own feelings?

A. *One consistent recommendation in the sexual abuse area is that on the initial interview by a professional, that the interview session itself be video taped. Thus other professionals independently can evaluate the quality of the interview techniques. That's the only way.*

Q. Is an audio tape valuable?

A. In lieu of, or as a substitute for the video tape?

Q. Of course that won't reflect the nonvocal –

A. Correct. That would be the problem with it. So video tape is always recommended.

Q. Let's talk about interviewing in one other way. Assume, if you would, please, this scenario: *Pediatrician interviewing two-year-old child with the following questions: "Do you play with daddy? Does daddy play with you? Do you ever touch daddy's pee-pee? Does daddy ever touch his pee-pee with you?"*

*How would you characterize that interview and those questions in terms of good procedure, responsible procedure that anyone should rely on?*

A. *All were closed-ended questions. And an inference I would make here is that the pediatrician would be in his or her office, probably wearing a white coat, which is more likely to evoke an acquiescence response; that is the child will answer in the way that the interviewer wants to hear. (Emphasis added.)*

All the dangerous circumstances testified to by Dr. Thurber and discussed in the literature were present in the interview of the younger Wright girl.

The circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not recorded, can never be fully assessed. Dr. Jambura may well have had preconceptions. He knew that the older Wright girl was alleging that she had been sexually abused by Wright and Giles and, in fact, the younger Wright girl had been brought to him by the police for sexual abuse examination as a result of concern occasioned by the older girl's allegations. He did not video tape or even audio tape the interview. He lost or threw away the picture he worked with in communicating with the little girl about what he meant by "Daddy's pee-pee." By Dr. Jambura's own testimony, he asked questions which were leading, (e.g., "Does daddy touch you with his pee-pee?"). He made no accurate record, video, audio or otherwise of the younger Wright girl's responses; rather, he merely testified that she "admitted" the facts assumed in his leading question. Since there is no transcript or tape of this conversation, it remains unclear what Dr. Jambura is calling an "admission" that Daddy (Robert Giles) touch her with his "pee-pee." Whether she said "yes" or nodded agreeably is

unclear. In any event, she did not elucidate or use her own words.

By no means can one say that the "particularized guarantees of trustworthiness" required to withstand objection pursuant to the Confrontation Clause are demonstrable in this case. Where courts have admitted the hearsay declarations of child witnesses, statements were overwhelmingly found to be reliable only because they were excited utterances (Rule 803(2) I.R.E.) or part of the *res gestae*. The theory is that there was no time for fabrication, coaching or confabulation and, therefore, the guarantees of reliability shared by those traditional exceptions to the rule against admission of hearsay statements were present. Some examples of such admissible hearsay include: *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983) (excited utterance of a four year old); *Kilgore v. State*, 340 S.E.2d 640 (Ga. App. 1986) (*res gestae*, declarations of three year old); *State v. Daniels*, 380 N.W.2d 777 (Minn. 1986) (excited utterance concerning being locked in a room during a fire); *People v. Orduno*, 145 Cal. Rptr. 806 (Cal. App. 1978) (spontaneous, excited utterance when first in mother's presence, right after being in defendant's presence); *Lancaster v. People*, 615 P.2d 720 (Colo. 1980) (declaration made one-half hour after the sexual assault, as soon as declarant was in her mother's presence); *D.L.N. v. State*, 590 S.W.2d 820 (Tex. 1979); *Bishop v. State*, 581 P.2d 45 (Okla. Cr. 1978) ("He hurt me, he hurt me" immediately after incident). Conversely, courts examining admissibility of incompetent witness' declarations occurring appreciably after the incident generally exclude the declarations, as in the following cases: *Keefe v. State*, 72 P.2d 425 (1937) (four year old made declaration to her

parents several days after sodomy); *State v. Jalette*, 382 A.2d 526 (R.I. 1978); *Brown v. State*, 344 So.2d 641 (Fla. App. 1977) (girl under fourteen made disclosure to her mother three days after lewd conduct); *State v. Lovely*, 517 P.2d 81 (Ariz. 1973) (seven year old disclosed abuse to policeman two weeks after lewd conduct); *Scott v. State*, 206 S.E.2d 558 (Ga. App. 1974).

Dr. Jambura's testimony as presented lacks particularized guarantees of trustworthiness and, in fact, is fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate. We are not convinced, beyond a reasonable doubt, that the jury would have reached the same result had the error not occurred.<sup>2</sup> Thus, we reverse Wright's conviction on the count charged with respect to the acts against the younger daughter because of the Confrontation Clause violation and remand the case for trial consistent herewith.

BISTLINE and JOHNSON, JJ., concur.

SHEPARD, J., sat but did not participate due to his untimely death.

BAKES, C.J., dissenting:

The Court today reverses Wright's conviction because of an alleged violation of the right to confrontation under the sixth amendment to the United States Constitution. The majority opinion concludes that "Dr.

<sup>2</sup> The author has determined that the conclusion he reached in his separate opinion in *Giles* with regard to the harmfulness of the admission of Dr. Jambura's testimony was incorrect.



Jambura's testimony as presented lacks particularized guarantees of trustworthiness and, in fact, is fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate." \_\_ Idaho at \_\_, \_\_ P.2d at \_\_. The majority reaches this conclusion after conducting an analysis totally unlike any confrontation clause analysis previously used by any court, particularly the United States Supreme Court. As I deduced from the opinion's analysis, from now on all hearsay statements by very young children are inadmissible unless they are either (1) uttered spontaneously and excitedly, or (2) made in response to "open-ended" questions from a specially trained professional during a videotaped interview and the evidence establishes that the child's memory was not "confabulated" by previous improper interviews. To my knowledge no court, state or federal, has ever held that the majority opinion's proposed standards are required by the sixth amendment confrontation clause. The opinion cites no case, federal or state, which has adopted such a severely limited application of the *federal* confrontation clause "indicia of reliability" test. Certainly the most recent decisions of the United States Supreme Court have not imposed the above requirements set out in the majority opinion. *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930 (1970), and *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 253 (1980), hold that hearsay is admissible under the confrontation clause if it bears "particularized guarantees of trustworthiness" and "indicia of reliability." But, as those opinions point out, the "particularized guarantees of trustworthiness" and "indicia of reliability" are to be determined from *all* of the facts and circumstances, not just the requirements set

forth in the majority opinion. The United States Supreme Court, which is the final arbiter of the interpretation and requirements of the sixth amendment confrontation clause of the United States Constitution, has never suggested that the majority opinion's standards are constitutionally required. In utilizing this restrictive method of analysis, the opinion errs seriously and essentially ignores the "indicia of reliability test" set forth by the United States Supreme Court.

While the majority opinion concludes that the hearsay evidence of Dr. Jambura was erroneously admitted because it violates the confrontation clause of the sixth amendment of the United States Constitution, much of the analysis sounds as though the opinion was based upon state evidentiary law. Thus, by placing emphasis on whether a child abuse victim's statement to a professional was "excited," the majority opinion highlights hearsay exception I.R.E. 803(2) to the exclusion of other hearsay exceptions, particularly I.R.E. 803(24) which requires the same circumstantial guarantees of truthfulness equivalent to the excited utterance exception. The opinion seems to wrongly conclude that a child's words are only reliable when uttered excitedly. However, as this Court pointed out in *State v. Hester*, when comparing the other exceptions to the hearsay rule to the excited utterance exception in I.R.E. 803(2), "Once these elements [the elements of trustworthiness required under I.R.E. 803(24)] are met, the I.R.E. 803(24) exception is equally as valid as any other hearsay exception, such as the universally accepted present sense impression and the excited utterance exceptions, etc." *State v. Hester*, 114 Idaho at 697, 760 P.2d at 36 (1988) (emphasis added.)

Under the majority's new standards for its confrontation clause analysis, evidence which would otherwise satisfy the "trustworthiness" and "indicia of reliability" standard established by the United States Supreme Court, especially corroborating physical and medical evidence, appears to become irrelevant. Excited utterances seem to be the only constitutionally accepted type of hearsay which is admissible, short of complying with the new standards which, as a practical matter, can never be met.

A child's report of sexual abuse is not always spoken excitedly, and it is not always directed at a professional specifically trained in interviewing child victims of sexual abuse, as the majority now seems to require. A professional, such as a family pediatrician, may observe evidence of sexual abuse while conducting a routine examination of a young patient. The doctor may question the youngster and receive important hearsay evidence. Under the law pronounced today, this evidence will be inadmissible unless the doctor was trained specifically to interview child victims of sexual abuse and asked no "closed-ended" questions. Furthermore, it is highly unlikely that the interview would have been videotaped. Family doctors do not normally film their examinations of young patients; most probably do not have video cameras in their examining rooms. Furthermore, many rural communities do not have the financial means to set up extensive videotape facilities to aid in the preparation of criminal cases. Until today, there were no such requirements under either state or federal law.

The majority opinion also makes an erroneous application of the facts of the case to its new confrontation clause standard. For instance, the opinion's discussion

implies that the younger daughter's statements came after her memory was "confabulated" by previous improper interviews. On the contrary, Dr. Jambura was the *first* interviewer. Therefore, the record does not support a finding that the younger daughter's statement to Dr. Jambura was affected by prior memory confabulation or improper tainting.

The majority's opinion further concludes that, "The [child's] statements lack trustworthiness because this interrogation was performed by someone with a preconceived idea of what the child should be disclosing." — Idaho at \_\_\_, \_\_ P.2d at \_\_\_. This statement suggests that the Court is setting an additional standard, which requires that the interrogation be performed by someone who has no idea what the child will be disclosing. In the usual case the specially trained professional will be advised of the purpose of the physical examination, either by the parents or by the authorities, and thus will have "a preconceived idea of what the child should be disclosing," which the majority opinion says disqualifies him from testifying. This case is such an example. The day before Dr. Jambura examined the 2½ year old girl, he had also examined her 5 year old sister and uncovered evidence of sexual abuse on the older girl. He was also informed of the older sister's statement to law enforcement and medical personnel explaining how she and her sister had been sexually abused by Wright and Giles. He also knew that the younger daughter had just been taken away from her parents and put into protective custody. To automatically disqualify an interviewer because he has "a preconceived idea of what the child should be disclosing" will, in all probability, eliminate the use of nearly *all*



statements made by young children to medical doctors, psychologists or social workers. That result is certainly not required by the confrontation clause of the sixth amendment of the United States Constitution, according to the decisions of the United States Supreme Court. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 253 (1980); *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930 (1970) And it certainly is not required under the evidentiary laws of the State of Idaho, as our recent cases have held. *State v. Giles*, \_\_\_ Idaho \_\_\_, \_\_\_ P.2d \_\_\_ (1989); *State v. Hester*, 114 Idaho 688, 760 P.2d 17 (1988).

I would affirm the judgment and sentence of the district court for the same reasons set out in our opinion dealing with the co-defendant Giles in *State v. Giles, supra*.

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## APPENDIX B

STATE of Idaho, Plaintiff-respondent,

v.

Robert L. GILES, Defendant-appellant.

No. 17634.

Supreme Court of Idaho.

March 30, 1989.

Defendant was convicted in the Fourth Judicial District Court, Ada County, Gerald F. Schroeder, J., of lewd conduct with a minor under 16 and he appealed. The Supreme Court, Bakes, J., held that hearsay statements of three-year-old victim were admissible.

Affirmed.

Johnson, J., filed a specially concurring opinion.

Huntley, J., filed an opinion concurring in the result.

Bistline, J., filed a dissenting opinion.

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Alan E. Trimming, Ads County Public Defender, Boise, for defendant-appellant. Deputy Public Defender Richard D. Toothman argued.

Jim Jones, Atty. Gen., Boise, for plaintiff-respondent. Myrna A.I. Stahman, Deputy Atty. Gen., argued.

BAKES, Justice.

Defendant Robert L. Giles (Giles) appeals his conviction on two counts of lewd conduct with minor children under the age of sixteen years. Giles was jointly charged with Laura Lee Wright who was also convicted for the

same crimes which were jointly committed against her two daughters, aged 5½ (older daughter) and 2½ (younger daughter) when the crimes were charged. Giles and Wright were jointly tried and convicted by the same jury. The defendant Giles filed a separate appeal. We affirm.

The older daughter was born April 1, 1981, to Laura Wright and Louis Wright, who separated from one another on September 22, 1982. Her parents reached an informal agreement whereby each parent would have custody of their daughter for consecutive 6-month periods. The younger daughter was born April 4, 1984, to Laura Wright and the defendant Robert Giles. She was living with them at the time the lewd conduct was committed.

On October 7, 1986, Louis Wright took custody of the older daughter pursuant to the agreement. On November 8, 1986, the older daughter revealed to Cynthia Goodman, Louis Wright's girlfriend, that she had been sexually abused by her mother and Giles. The older daughter also stated that her younger half-sister had been sexually abused as well.<sup>1</sup> The following day, November 9, 1986, Goodman reported the sexual abuse of the two girls to the police. Examinations of the older daughter that day by three doctors revealed an abrasion near the vaginal opening, an evidence of a hymeneal ring, a fairly large bruise on the left upper leg and a slightly larger vaginal

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<sup>1</sup> At trial, held May 6-12, 1987, the older daughter testified that Giles had intercourse with the younger sister while Laura held the Younger sister's legs and covered her mouth so she wouldn't scream.

opening than would be expected for a girl her age. One of the three, Dr. Jambura, a pediatrician with extensive experience in child abuse cases, testified that it was "highly possible that vaginal penetration had been occurring on a relatively regular basis."

That same day, the younger daughter was taken from her mother and Giles and into custody by a police officer and a social worker. The next day, Dr. Jambura examined the younger daughter. His examination revealed some redness and bruises in the early stages of healing on the inner surface of the labiuro majors and the labiuro minors and some scarring on the back portion of the vagina. The healing area around the vagina was inflamed and swollen. Dr. Jambura explained that it is very difficult to bruise the labium minors and the bruising on the surfaces of both labia suggests that forcible contact was made with the inner genital area. He testified that these injuries were "strongly suggestive of sexual abuse with vaginal contact." Dr. Jambura believed the trauma occurred approximately 2-3 days prior to the examination.

During Dr. Jambura's examination of the younger daughter, the two engaged in conversation. Over defense objection, Dr. Jambura testified at trial regarding this conversation:

A. [By Dr. Jambura] . . . She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, "Well, how are things at home," you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, "Do you play with daddy? Does Daddy play with you? Does daddy touch you with his

pee-pee? Do you touch his pee-pee?" And again we then established what was meant by pee-pee, it was a generic term for genital area.

Q. [By the prosecutor] Before you get into that, what was, as best you recollect, what was her response to the question "Do you play with daddy?"

A. Yes, we play - I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And "Does daddy play with you?" Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

A. Yes.

Q. What did you observe?

A. She would not - oh, she did not talk any further about that. She would not elucidate what exactly - what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.

Giles raises one issue on appeal: whether the trial court properly allowed Dr. Jambura to testify concerning the out-of-court statements made to him by the younger daughter.

We first note that the trial court conducted a *voir dire* examination of the younger daughter to determine whether she was capable of communicating to the jury. He determined that she was not and counsel agreed.

We recently decided a case with unfortunate similarity to this case. In *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988), we held that hearsay statements of a three-year-old sexual abuse victim were properly admitted under the hearsay exception contained in I.R.E. 803(24), concluding that the trial court's admission of such a statement was a proper exercise of discretion where the court had considered all of the factors set out in I.R.E. 809(24). We held:

To be admissible under I.R.E. 803(24), the court must determine that (A) the statement has circumstantial guarantees of trustworthiness equivalent to those in Rules 803(1) to 803(23), (B) the statement is offered as evidence of a material fact, (C) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (D) the general



purposes of the rules of evidence, and the interests of justice, will best be served by admission of the statement into evidence. Further, (E) a statement may not be admitted under I.R.E. 803(24) unless its proponent gives the adverse party adequate notice and information regarding use of the statement. Once these elements are met, the I.R.E. 803(24) exception is equally as valid as any other hearsay exception, such as the universally accepted present sense impression and the excited utterance exceptions, etc.

114 Idaho at 697, 760 P.2d at 36. As our prior cases hold, the trial court's ruling admitting such evidence will not be reversed on appeal absent a showing that the court abused its discretion. *State v. Terry*, 98 Idaho 285, 561 P.2d 1318 (1977); *State v. Thomas*, 94 Idaho 430, 489 P.2d 1310 (1971).

As was the case in *Hester*, the trial court here did not abuse its discretion because all the requirements were met. All of the I.R.E. 803(24) requirements were addressed by the trial court in determining the admissibility of the hearsay evidence. The trial court evaluated the hearsay statements for relevancy, need and reliability. *Hester*, 114 Idaho 688, 760 P.2d 27 (1988). The trial court's analysis here focused primarily on what appears to be the main source of contention surrounding the statements, i.e., their reliability. Besides arguing that the statements should be inadmissible because the younger daughter could not testify, appellant directed his challenge to an attack on the statements' reliability. As indicia of unreliability, appellant cites the alleged suggestiveness of Dr. Jambura's questions (by referring to "daddy") and the younger daughter's alleged inability to recollect and communicate because of her age. Appellant attempts to

distinguish between indicia of reliability and corroborative evidence, and suggests that the latter should not be considered in an I.R.E. 803(24) analysis. However, we said in *Hester* that for a statement "to be admissible under I.R.E. 803(24), the court must determine that (A) the statement has *circumstantial* guarantees of trustworthiness . . . , " and that "the statement is more probative on the point for which it is offered than *any other evidence* which the proponent can procure through reasonable efforts. . . ." The analysis required by I.R.E. 803(24) and *Hester* contemplates that the trial court will look at all the other evidence to determine whether it tends to corroborate the hearsay statement, before the trial court concludes that the hearsay statement has the same circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions.

Appellant does not claim to have been denied adequate notice and information regarding use of the younger daughter's statements to Dr. Jambura. Nor does appellant suggest that the statements are not offered as evidence of the material fact that Giles sexually abused the younger daughter. Thus, there is no question but that the statements are relevant. As previously discussed, *ante* at \_\_\_, 772 P.2d at 193, the younger daughter was judged unable to communicate in a trial setting and was therefore unable to be a witness at trial. Consequently, the hearsay statements made to Dr. Jambura were "more probative on the point for which [they were] offered than any other evidence which the proponent can procure through reasonable efforts." I.R.E. 803(24)(B). Thus, there is a need for the statements.

The final step in the analysis concerns the statements' reliability. The trial court here weighed the indicia of unreliability cited by Giles – the alleged suggestiveness of Dr. Jambora's questions and the younger daughter's alleged inability to recollect or communicate – against significant indicia of reliability. The trial court stated:

In this case, of course, there is physical evidence to corroborate that sexual abuse occurred. It also would seem to be the case that there is no motive to make up a story of this nature in a child of these years. We're not talking about a pubescent youth who may fantasize. The nature of the statements themselves as to sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up. This is simply not the type of statement, I believe, that one would expect a child to fabricate.

We come then to the identification itself. Are there any indicia of reliability as to identification? From the doctor's testimony it appears that the injuries testified to occurred at the time that the victim was in the custody of the Defendants. The [older daughter] has testified as to

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<sup>2</sup> We note, as an additional indicia of reliability, the absence of a custody battle over the younger daughter. Unsubstantiated accusations of sexual abuse sometimes arise when one parent seeks to terminate custodial rights of the other parent. The child's coached remarks may be sought for use as an evidentiary weapon by an unscrupulous parent. Testimony given under these circumstances may be unreliable and ruled inadmissible. Concern over such abuse is not present here, however. The younger daughter was taken directly from the custody of both parents and was then examined by Dr. Jambura when the statements were made.

identification of perpetrators. Those – the identification of the perpetrators in this case are persons well known to the [younger daughter]. This is not a case in which a child is called upon to identify a stranger or a person with whom they would have no knowledge of their identity or ability to recollect and recall. Those factors are sufficient indicia of reliability to permit the admission of the statements.

Under these circumstances, the statements have circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions. Furthermore, the interests of justice and the general purposes of evidence were best served by admission of these statements.

Having found the statements sufficiently reliable, the trial court stated, "It's then up to the jury to determine if they [the statements] are sufficiently reliable to give weight to in their determinations. . . ." Giles was still able, during his defense, to present a witness, Dr. Tearber, to attack the statements' reliability. He was also able to argue to the jury that they should not give weight to the statements. However, the jury concluded otherwise.

Accordingly, we conclude that the trial court did not err when it allowed Dr. Jambura to testify concerning the younger daughter's statements to him. *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988). The conviction of defendant Giles is affirmed.

SHEPARD, C.J., and JOHNSON, J., concur.

JOHNSON, Justice, concurring specially.

I concur here because *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988) is controlling precedent. Although I dissented in *Hester*, it is now the law of this state, and I



will follow it. I am unable to distinguish the facts of this case from those of *Hester* sufficiently to avoid its application as stare decisis.

*Hester* did not address the admissibility of hearsay under the Confrontation Clause. Giles has not raised the issue here. This issue has been raised in the companion case to this one, *State v. Wright*, S.Ct. No. 17033, that has been argued but not decided, and will be addressed there.

HUNTLEY, Justice, concurring in the result.

While I am totally in agreement that traditional rules of evidence must be relaxed or modified to accommodate admissibility of children's testimony and out-of-court statements in child abuse cases, I am disturbed that the majority lacks either the imagination or the will to formulate rules for minimum safeguards for the defendant.<sup>3</sup>

At minimum, the sessions should be video-taped and the examiner should not be permitted to use leading, suggestive and "closed-ended" questions. The procedure and the questioning herein were improper and erroneous.

#### I. TESTIMONY

The trial court permitted Dr. John Jambura, a pediatrician who conducted a physical examination of the younger Wright girl and asked her whether sexual abuse

<sup>3</sup> Unfortunately, Giles has not raised the confrontation clause requirements in this appeal and a majority of the Court are of the position that we cannot raise it on our own opinion. See, 102 Harvard Law Review at 156.

occurred between her and the two co-defendants, to testify concerning hearsay statements made to him by the younger Wright daughter. This evidence was admitted over the defendants' objection. The younger Wright daughter was three years old at the time of the trial and only two-and-one-half years old at the time of the out-of-court statements to Dr. Jambura. She did not testify at trial. After the judge conducted a voir dire examination of the child, he asked both counsel if they agreed that she was incompetent to testify and both agreed she was not competent.

Dr. Jambura examined and interviewed the younger daughter and was allowed to testify to her responses to four questions, his testimony being:

.... "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" And again we then established what was meant by pee-pee, it was a generic term for genital area.

Q. Before you get into that, what was, as best you recollect, what was her response to the question "Do you play with daddy?"

A. Yes, we play - I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And "Does daddy play with you?" Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

Q. And then what did you say and her response?



A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

She allegedly then volunteered that her daddy "... does do this with me, but he does it a lot more with my sister than with me."

The doctor's testimony was clearly hearsay and since his interview was conducted without any procedural safeguards to permit meaningful cross-examination or review as to the integrity of the interview procedure, it should not have been admitted for the reasons which follow.

## II. HEARSAY

The trial court admitted these statements under Rule 803(24) I.R.E. which provides:

Rule 803. Hearsay exceptions; availability of declarant immaterial. - The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

....

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be

admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

The hearsay declaration of the younger Wright girl is inherently unreliable because of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura.<sup>4</sup>

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<sup>4</sup> Because I address only the coincidence of the fact of the hearsay declarant's youth and the fact that the context of the declaration was an interview by a professional, I am not required to address the defendant's contention that this hearsay is rendered inherently unreliable by the district court's finding that the younger Wright girl was incompetent as a witness at trial. The defendant contended that the hearsay declaration of the young Wright girl is also unreliable because of the effect of her incompetence as a witness. In reading cases from other jurisdictions one must bear in mind that competency rules vary. In Idaho, all that is required of witnesses is that they be capable both of receiving just impressions of the facts respecting which they are examined and of recalling them truthfully. Rule 601(a) I.R.E. The trial court found the younger Wright girl to be incompetent to testify at trial. Defendant argues this necessarily entails a finding that she is incapable of receiving accurate impressions or of relating them. However, the fact of incompetency to testify at trial does not mean that spontaneous declarations made at or near the time of an incident or responses made in a properly conducted interview lack sufficient reliability to be admitted in evidence. Cf. *State v. Paster*, 324 A.2d 587 (R.I. 1987) (Declarations to a social worker, a doctor, and a counselor which implicated the victim's father were held inadmissible no matter what hearsay exception was

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To assess the impact of Dr. Jambura's interview techniques, it is necessary to review some precepts of developmental psychology. Children's cognitive abilities do not merely increase quantitatively. They go through recognizable stages which have been recognized as qualitatively different. Childhood cognition is fundamentally different from thinking and recalling in adults. See, e.g., J. Piaget, *THE LANGUAGE AND THOUGHT OF THE CHILD*. (1926). Some authorities state that most of the development of accurate recall skills occurs between ages five and ten. Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory* 40 J.SOC.ISSUES 93, 34-36 (1984). Younger children have memories, but may lack the ability to recall and relate them. *Id.*; Loftus & Davies, *Distortions in the Memory of Children*, 40 J.SOC.ISSUES, 51, 54 (1984). Leading questions, such as those asked by Dr. Jambura, are tempting because they may serve to help a child recall. However, they are extremely dangerous as a means leading to admissible evidence at a criminal trial (as opposed to as an aid in therapy for the child) because of the nature of children's memory. Even adults' memory can be tainted

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relied upon, the court reasoned that statements made by an incompetent witness do not become more reliable when reported by an adult in court. Nevertheless, the court left open the possibility that a young child's declarations may be admissible if their circumstances contain a guarantee of trustworthiness such as spontaneous excited statements made close in time to the acts complained of. 524 A.2d at 590). Because of my analysts today, this argument is relevant only as a means of showing an aggravation of unreliability rather than as constituting a distinct, salient source of that unreliability as a matter of law.

to the point that their actual testimony is deemed too unreliable to be admitted without offense to due process. Examples include the tainted identification resulting from an unduly suggestive lineup or the effect of hypnosis. Cf. *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 671 (1984) (in determining question of admissibility of hypnotically induced testimony, circumstances surrounding hypnotic sessions should be examined in light of suggestive safeguards, and it should then be determined if, in the totality of circumstances, it appears that testimony proposed is sufficiently reliable to merit admission). The problem of tainted memory is much more severe in young children. See e.g., Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 LAW & HUMAN BEHAVIOR 210 (1980).

The risk with young children is that they may be unable to distinguish between a memory of something which actually happened from a memory of something they imagine happening. See e.g. Johnson & Foley, *supra*, at 45. If an interview technique leads a child to imagine an event, the child's memory of that imagined event will be indistinguishable from memories of events which the child actually experienced. Loftus & Davies, *supra*, at 52-53. Once this tainting of memory has occurred, the problem is irremediable. That memory is, from then on, as real to the child as any other. This "confabulation" is precisely the problem with hypnotically enhanced memory discussed by this Court in *Iwakiri*, 106 Idaho 618, 682 P.2d 671. See, Loftus & Davis, *supra*, at 65; Stafford, *The Child as a Witness*, 37 Wash.L.Rev. 303 at 309 (1962).

In addition to leading questions, other circumstances can lead to memory confabulation. A person the child



perceives to have high status will more easily influence the child to accept suggestions. It is therefore critical that neither the interviewer nor anyone else present have preconceptions. Goodman & Hegelson, *Child Sexual Assault: Children's Memory & the Law*, 40 U.Miami L.Rev. 181, 187-97 (1985).

The research discussed in the literature cited above is consistent with the testimony of Dr. Thurber, an expert in child psychology who testified for the defendant at trial.

A. Well, children who have a mental age of five years and chronological age of five years would have difficulty distinguishing fantasy from reality. The work of John Piaget, the great Swiss Psychologist, indicates that children of five, on the average, are unable to distinguish things that they have thought about from things that they've actually encountered in a world of reality.

Children at the age of five years mentally have problems in retrieving memories, so memories that are once stored have - are not consolidated, so to speak, are placed in abstract conceptual categories. The information may be there, it's just hard to retrieve it or bring it forth. And for these reasons children of this age level are very prone to respond to such things as leading questions. A question that implies information that was not actually the world of reality may become part of memory of a child, believes that that information fully occurred in the world of reality.

What I'm saying is that a child who was five years eight months chronologically, but has a mental age 15 months or so below that, will have even more severe problems in terms of retrieving memories and prone to be influenced

by leading questions, will have problems distinguishing imagery, what they think about from the actual outside world.

Q. Do I understand you to be saying then, Dr. Thurber, that - correct me if I'm wrong, that were I to discuss with a child a particular action and event of that age that the child had not, in fact, experienced and discussed at some length, and asked the child to repeat it, that a child may have trouble distinguishing whether that actually happened to them or whether they've heard about it?

A. That's correct. It's especially the case in events that imply action. So if you describe for a four or five-year-old child some kind of an action-related behavior on the part of other people, the child has particular problems in distinguishing the discussion, the information presented verbally, from an actual experience and may confuse the two. And this comes from a lot of recent research at New York University in regard to children and fantasy versus reality.

Q. Now, the child that confuses that what they've heard with what actually happened to them, and they recite what they've heard or report what they've heard, is that child lying in the normal sense that we understand it?

A. Absolutely not. Lying in the normal sense involves some kind of deception. To young children about the age of five on the average what is in their memory is true regardless of how that information got into the memory banks.

Q. If a child were to be reciting information that is true, even if it's not, in fact, happened something that they're heard and they've taken into their minds as being true, is that likely to affect how they react in the telling of it; their



body positions, their outward acting, observations?

A. If a child is coming forth with what has been stored in memory, their nonverbal behaviors will be very consistent with that information. That is, they wouldn't be able to distinguish from what source the information was stored.

....

Q. What are some of the pitfalls or dangers to be aware of to be sure that you're gathering accurate data from a child?

A. My first response is they are probably too numerous to mention. But, first and foremost, the examiner, the evaluator, the interrogator must be aware of personal biases and how those biases can be reflected in an interview situation. *The primary consideration would be not to ask what are termed closed-ended questions, questions that can be asked - pardon me, questions that can be answered yes or no.* It has been found that an interviewer's pre-existing assumptions and biases can be reflected in these questions and can guide children into the responses that the interviewer wants to see.

So we ask open ended questions, questions that cannot be answered yes or no. It has also been found that interviewers can very subtly reward the responses they want to see, and can shape the answers of children. One of my colleagues in the Portland area, Bill McGeiver has found that simply by nodding the head and saying "um-hum" he can shape, so to speak, gradually shape behaviors in young children that border on the sexually bizarre, and these are children who have had no sexual abuse in their background. Now these are also very young children, I might mention, from the four to six-year-old range.

So, an interviewer must be very, very aware that very subtle cues such as a nod or saying "um-hum" can reward young children, in effect, and can shape and determine the responses that the interviewer is going to see.

Attention, as such, is also a very important factor. If an interviewer has decided that a child has been sexually abused, for example, that interviewer will likely attend when the child responds in a way that is consistent with the assumptions, and will not attend if the child responds in a way that is contrary to the pre-existing assumption.

So, I think of the important issues here, the key ones are open ended questions, be aware of pre-existing biases, do not respond in subtle ways that might reward the responses that you want to see. We could go on and on. There are multitudinous problems in interviewing children.

One of my colleagues who - from whom I received training at the University of Oklahoma Medical School has recently published a book on the investigation and treatment of child abuse, and is probably the nation's authority at this time, C. Eugene Walker, and his position is that in initially approaching a child that presumably has been abused, that you use a very nonstructured kind of situation. You don't even ask questions. Bring the child in a room with many toys, many writing implements, papers. Let the child just behave spontaneously and see what comes of this kind of a situation without attempting to prompt or influence the child by questions. And I would strongly support that approach because of the many possibilities of bias in terms of our questions.

Q. That sounds like a difficult task then to be certain not to inject anything into the interview.

A. Very much so.

Q. How can one guard – the best techniques for guarding against that so we can go back and determine whether an interviewer has skewed the information or injected their own feelings?

A. *One consistent recommendation in the sexual abuse area is that on the initial interview by a professional, that the interview session itself be video taped. Thus other professionals independently can evaluate the quality of the interview techniques. That's the only way.*

Q. Is an audio tape valuable?

A. In lieu of or as a substitute for the video tape?

Q. Of course that won't reflect the nonvocal –

A. Correct. That would be the problem with it. So video tape is always recommended.

Q. Let's talk about interviewing in one other way. Assume, if you would, please, this scenario: *Pediatrician interviewing two-year-old child with the following questions: "Do you play with daddy? Does daddy play with you? Do you ever touch daddy's pee-pee? Does daddy ever touch his pee-pee with you?"*

*How would you characterize that interview and those questions in terms of good procedure, responsible procedure that anyone should rely on?*

A. *All were closed-ended questions. And an inference I would make here is that the pediatrician would be in his or her office, probably wearing a white coat, which is more likely to evoke an acquiescence response; that is the child will answer in the way that the interviewer wants to hear. (Emphasis supplied.)*

All the dangerous circumstances testified to by Dr. Thurber and discussed in the literature were present in the interview of the younger Wright girl.

The circumstances surrounding this interview demonstrate dangers of unreliability which, because the interview was not recorded, can never be fully assessed. Dr. Jambura may well have had preconceptions. He knew that the older Wright girl was alleging that she had been sexually abused by Wright and Giles and, in fact, the Younger Wright girl had been brought to him by the police for sexual abuse examination as a result of concern occasioned by the older girl's allegations. He did not video tape or even audio tape the interview. He lost or threw away the picture he worked with in communicating with the little girl about what he meant by "Daddy's pee-pee." By Dr. Jambura's own testimony, he asked questions which were leading, (e.g., "Does daddy touch you with his pee-pee?"). He made no accurate record, video, audio or otherwise of the younger Wright girls' responses; rather, he merely testified that she "admitted" the facts assumed in his leading question. Since there is no transcript or tape of this conversation, it remains unclear what Dr. Jambura is calling an "admission" that Daddy (Robert Giles) touched her with his "pee-pee." Whether she said "yes" or nodded agreeably is unclear. In any event, she did not elucidate or use her own words. By no means can one say that either the requisite "circumstantial guarantees of trustworthiness" or "particularized guarantees of trustworthiness" for admissibility under Rule 803(24) I.R.E. and the Confrontation Clause, respectively, are present in this case. Where courts have admitted the hearsay declarations of child



witnesses, statements were overwhelmingly found to be reliable only because they were excited utterances (Rule 803(2) I.R.E.) or part of the *res gestae*. The theory is that there was no time for fabrication, coaching or confabulation and, therefore, the guarantees of reliability shared by those traditional exceptions to the rule against admission of hearsay statements were present. Some examples of such admissible hearsay include: *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983) (excited utterance of a four year old); *Kilgore v. State*, 177 Ga. App. 656, 940 S.E. 2d 640 (1986) (*res gestae*, declarations of three year old); *State v. Daniels*, 380 N.W.2d 777 (Minn. 1985) (excited utterance concerning being locked in a room during a fire); *People v. Orduno*, 80 Cal. App 3d 738, 145 Cal. Rptr. 806 (1978) (spontaneous, excited utterance when first in mother's presence, right after being in defendant's presence); *Lancaster v. People*, 200 Colo. 448, 616 P.2d 720 (1980) (declaration made one and one-half hours after the sexual assault, as soon as declarant was to her mother's presence); *D.L.N. v. State*, 590 S.W.2d 820 (Tex. 1979); *Bishop v. State*, 581 P.2d 45 (Okla. Cr. 1978) ("He hurt me, he hurt me" immediately after incident). Conversely, courts examining admissibility of incompetent witnesses' declarations occurring appreciably after the incident generally exclude the declarations, as in the following cases: *Keefe v. State*, 50 Ariz. 293, 72 P.2d 425 (1937) (four year old made declaration to her parents five or six days after sodomy); *State v. Jolette*, 119 R.I. 614, 382 A.2d 526 (1978); *Brown v. State*, 344 So.2d 641 (Fla. App. 1977) (girl under fourteen made disclosure to her mother three days after lewd conduct); *State v. Lovely*, 110 Ariz. 219, 517 P.2d 81 (1973) (seven year old disclosed abuse to policeman two weeks

after lewd conduct); *Scott v. State*, 131 Ga. App. 655, 206 S.E.2d 658 (1974). In *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) the court ruled on two declarations. The mother picked the child up from the defendant-babysitter. She found her son with his pants unzipped in a locked bedroom with the defendant. At home she noticed "white stuff." The child described anal intercourse to her in child-like language while still in obvious distress. This declaration to the mother was admissible, including his identification of the defendant. The child's later declaration identifying the defendant to a physician was not admissible.

### III. CONFRONTATION

The sixth amendment to the United States Constitution provides in part that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. Amend. VI. This provision is applicable to the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

The purpose of the right of confrontation is to "advance 'the accuracy of the truth-determining process in criminal trials' " by allowing only reliable evidence to be admitted. *Tennessee v. Street*, 471 U.S. 409, 105 S.Ct. 2078, 2082, 85 L.Ed.2d 425 (1985), (quoting *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970)). "The right to confront and cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee v. Illinois*, 476 U.S. 590, 106 S.Ct. 2056 at 2062, 90 L.Ed.2d 614 (1986).



The hearsay rules and the Confrontation Clause have similar policy objectives. *California v. Green*, 899 U.S. 149, 165, 90 S.Ct. 1930, 1983, 26 L.Ed.2d 489 (1970). However, they are not coextensive. Some out-of-court declarations which are admissible under hearsay exceptions may violate confrontation rights. E.g., *Green, supra*, 393 U.S. at 153-156, 90 S.Ct. at 1932-1933; *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The Confrontation Clause objective of reliability is met by cross-examination, an opportunity for the jury to observe the witness' demeanor, and face-to-face confrontation between the witness and the accused. "[A] major reason underlying the constitutional confrontation right is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him." *Pointer v. Texas*, 390 U.S. 400 at 407-07, 85 S.Ct. 1065 at 1069-70. Concerning the opportunity for the jury to observe demeanor, the Supreme Court mentioned the importance of live testimony, when a witness stands "face to face with the jury in order that they may look at him, and judge, by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43, 15 S.Ct. 337, 339-40, 39 L.Ed. 409 (1895). The purpose of confrontation between an accuser and defendant is that it "undoubtedly makes it more difficult to be against someone, particularly if that person is an accused and is present at trial." *Ohio v. Roberts*, 448 U.S. 56 at 63 n. 6, 100 S.Ct. 2531 at 2537 n. 6, 66 L.Ed.2d 697.

The impact of the Confrontation Clause upon the admissibility of hearsay is difficult to analyze. "Few tasks in criminal evidence are more perplexing than to describe

the effect of the Confrontation Clause of the sixth amendment upon the hearsay doctrine." 4 LOUSELL & MUELLER, *FEDERAL EVIDENCE* § 418 at 123 (1970). Hearsay which falls into a well-established exception is usually, but not always, reliable enough to satisfy confrontation. Other hearsay, such as the declarations of the younger Wright girl admitted in the "catch-all" provision of Rule 803(24) I.R.E., should be considered "presumptively unreliable and inadmissible for Confrontation Clause purposes" absent a showing of "particularized guarantees of trustworthiness." *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056, 2064, 90 L.Ed.2d 614 (1986).

Only last year, the United States Supreme Court found that the sexual assault defendant's right to face-to-face confrontation was violated by permitting two 13-year-old girls to testify behind a large screen that enabled Coy to dimly perceive the witnesses but rendered them unable to see him. *Coy v. Iowa*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2798, 101 L.Ed.2d 857, 43 Cr.L. 3226 (1988). I fail to see how Wright's right to face-to-face confrontation escaped violation in this event of admission of hearsay testimony which did not fall within any of the traditional exceptions and which was brought into evidence through an interview lacking procedural safeguards.

#### IV. INADMISSIBILITY

In summary, the hearsay declarations of the younger Wright girl were unreliable because of Dr. Jambura's interview technique: the questioning was not accurately recorded; the statements were not accurately recorded;

and, blatantly leading questions were used in the interrogation. Further, this interrogation was performed by someone with a preconceived idea of what the child should be disclosing.

I would hold that all declarations of very young children in response to a professional's interrogation are *per se* inadmissible unless they are spontaneous, excited utterances or 1) such declarations are elicited by a competent professional, specifically trained in interviewing child victims and aware of the dangers of suggestibility disclosed in psychological research; and, 2) the entire interview is videotaped so the possibility of verbal and non-verbal suggestion can be evaluated later;<sup>5</sup> and, 3) the evidence establishes that the child's memory was not confabulated by previous improper interviews. The reader will note that such a ruling would be similar to portions of the standards embodied in Uniform Rules of Evidence Rule 807.<sup>6</sup>

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<sup>5</sup> Videotaping can protect defendants against erroneous convictions perhaps even more than can cross-examination at trial. If improper suggestion taints a child's memory, no amount of cross-examination of the child will reveal the error. This is because the child is not being deceitful. Because of the confabulation problem, the suggested memory is as real to the child as any other.

<sup>6</sup> Rule 307. Child Victims or Witnesses

(a) A hearsay statement made by a minor who is under the age of [12] years at the time of trial describing an act of sexual conduct or physical violence performed by or with another on or with that minor or any [other individual] [parent, sibling or member of the familial household of the minor] is not excluded

(Continued on following page)

In *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988), we concluded that the standards in Uniform Rule 807

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(Continued from previous page)

by the hearsay rule *ii*, on motion of a party, the minor, or the court and following a hearing [in camera], the court finds that (i) there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court; (ii) the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; (iii) the statement was accurately recorded by audio-visual means; (iv) the audio-visual record discloses the identity and at all times includes the images and voices of all individuals present during the interview of the minor; (b) the statement was not made in response to questioning calculated to lead the minor to make a particular statement or is clearly shown to be the minor's statement and not the product of improper suggestions; (vi) the individual conducting the interview of the minor is available at trial for examination or cross-examination by any party; and (vii) before the recording is offered into evidence, all parties are afforded an opportunity to view it and are furnished a copy of a written transcript of it.

(b) Before a statement may be admitted in evidence pursuant to subsection (a) in a criminal case, the court shall at the request of the defendant, provide for further questioning of the minor in such manner as the court may direct. If the minor refuses to respond to further questioning or is otherwise unavailable, the statement made pursuant to subsection (a) is not admissible under this rule.

(c) The admission in evidence of a statement of a minor pursuant to subsection (a) does not preclude the court from permitting any party to call the minor as a witness if the interest of justice so require.

(d) In any proceeding in which a minor under the age of [12] years may be called as a witness to testify concerning an act of sexual conduct or physical violence performed by or with another on or with that minor or any [other individual]

(Continued on following page)



were not applicable in the context of a child's hearsay statements to his *mother* in a bathroom setting. The situation presented in this case involves a professional engaged in the execution of interrogation specifically designed to elicit information to be utilized in a criminal proceeding. Cf. *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) (discussed *supra* in Part II of this opinion). While the situation presented in *Hester* is more closely akin to that involved in traditional exceptions to the hearsay rule, such as the excited utterance or "*res gestae*"

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[parent, sibling or member of the familial household of the minor]. If the court finds that there is a substantial likelihood that the minor will suffer severe emotional or psychological harm if required to testify in open court, the court may, on motion of a party, the minor or the court, order that the testimony of the minor be taken by deposition recorded by audio-visual means or by contemporaneous examination and cross-examination in another place under the supervision of the trial judge and communicated to the courtroom by closed-circuit television. Only the judge, the attorneys for the parties, the parties, individuals necessary to operate the equipment and any individual the court finds would contribute to the welfare and well-being of the minor may be present during the minor's testimony. If the court finds that placing the minor and one or more of the parties in the same room during the testimony of the minor would contribute to the likelihood that the minor will suffer severe emotional or psychological harm, the court shall order that the parties be situated so that they may observe and hear the testimony of the minor and may consult with their attorneys, but the court shall ensure that the minor cannot see or hear them, except within the discretion of the court, for purposes of identification.

(e) The requirements for admissibility of a statement under this rule do not preclude admissibility of the statement under any other exception to the hearsay rule.

exceptions discussed above, the present situation lacks such circumstantial guarantees of trustworthiness and, in fact, is inherently fraught with the dangers of unreliability which the rule against admission of hearsay evidence and the Confrontation Clause are designed to highlight and obviate.

## V. HARMLESS ERROR

The next question is whether admission of such evidence was harmless error. Rule 62, I.C.R., provides that "any error . . . which does not affect substantial rights shall be disregarded." In determining whether an error has affected substantial rights or is harmless, the inquiry is "whether it appears from the record that the . . . [error] contributed to the verdict, leaving the appellate court with a reasonable doubt that the jury would have reached the same result had the [error] not occurred." *State v. Palin*, 106 Idaho 70, 75, 675 P.2d 49, 54 (Ct. App. 1983); *State v. Bussard*, 114 Idaho 781, 760 P.2d 1197, 1202 (Ct. App. 1988). This test parallels the harmless error test applied in federal courts as stated in *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.") (Cited in *Coy v. Iowa*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2798, 2803, 101 L.Ed.2d 857 (1988).)

The existence of sexual abuse, the existence of the crime charged, was evidenced by Dr. Jambura's testimony regarding his medical examination of the younger Wright girl. Dr. Jambura's expert opinion was that she



had injuries which were "strongly suggestive of sexual abuse with vaginal contact" which had occurred two to three days prior to the examination. Because of the severity of the injuries, Dr. Jambura could not ascertain whether chronic abuse had been occurring, yet he testified that there was scarring in the back portion of the vagina, that there was bruising of the labium minora, that the labium minora is very difficult to bruise, and that the bruising on the inner surfaces of both the labium majora and the labium minora suggested that forceful contact was made with the inner genital area.

The identity of the perpetrators was established by the older Wright girl's testimony at trial. The older Wright girl, who was six years old at the time of trial, testified that both she and her younger sister had been victimized by co-defendants Wright and Giles stating that Giles had intercourse with her younger sister while "[s]he [Laura] would be holding [the younger girl's] leg and holding her mouth so she wouldn't scream."

Applying the standard appropriate to determining whether an error has affected substantial rights or is harmless, it is apparent that admission of the pediatrician's declaration of the younger Wright daughter's hearsay statements was harmless error. I am convinced, beyond a reasonable doubt, that the jury would have reached the same result had the error not occurred. The State introduced a plethora of admissible, inculpatory evidence. In reviewing the record, I conclude that the probative impact of the State's case - omitting the inadmissible hearsay testimony of Dr. Jambura - was so great that I am convinced the conviction would have obtained

even if the inadmissible hearsay had not be admitted into evidence.

Accordingly, in the absence of the confrontation issue having been presented, I would affirm the conviction while providing the guidance for future interrogations as hereinabove set forth.

BISTLINE, Justice, dissenting.

Justice Huntley in his dissent conclusively demonstrates that the pediatrician's recitation of the child's testimony was inadmissible hearsay and violates the right to confront witnesses. The trial court found that the three year old child was INCOMPETENT TO TESTIFY AT TRIAL! How, then, could she have made "reliable" statements six months earlier to Dr. Jambura when she was only two and one-half years old?

It is necessary to go even farther than Justice Huntley. In cases like this the violation of the right to confront the alleged victim can never be harmless. A fundamental tenet of our criminal justice system guarantees the defendant the right to confront his or her accusers in open court through cross-examination. As the United States Supreme Court stated in *Davis v. Alaska*:

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the

[confrontation] clause hold that a primary interest secured by it is the right of cross-examination.' *Douglas v. Alabama*, 380 U.S. 415, 418 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Professor Wigmore stated:

'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' (Emphasis in original.) 5 J. Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940).

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.

415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974).

In child abuse cases there are often "no witnesses except the victim." *Pennsylvania v. Richie*, 480 U.S. 39, 60, 107 S.Ct. 989, 1003, 94 L.Ed.2d 40 (1987). Without the opportunity to cross-examine such a witness, no trial can be fair, and consequently, no error can be harmless.

## APPENDIX C

\* \* \*

(p. 368) Q. Now, as to Kathy Wright - perhaps would the Bailiff show Dr. Jambura State's Exhibit 3.

(Brief delay.)

Q. BY MR. NAYLOR: Do you recognize that picture?

A. I do, sir.

Q. Okay. And did you examine her on November 10th, 1986?

A. Indeed I did, sir.

Q. Do you recall where that was?

A. I recall that it was in my office.

Q. Was anyone else present?

A. There was a female attendant, I do not recall her identity and myself and the child. As I recall, her sister was not there during that time.

Q. And what type of exam did you perform on Kathy?

A. I examined her genital area as well as her anal, rectal area.

Q. And what did you find in the anal area?

A. The anal area showed no scarring or other sort of lesions, and she had normal sphincter tone on rectal examination.

(p. 369) Q. And what, if any, opinion were you able to formulate from that examination?

A. From that examination I think it's highly unlikely that any nonaccidental trauma had occurred to the anal area.

Q. And turning then to the genital exam. What did you find at that time?

A. She had some redness and some bruises that were in the early stage of healing on the inner surface of the labium majora and the labium minora, there was some scarring in the back portion of the vagina as we've mentioned - or as we've discussed previously. The healing area around the vagina was inflamed and swollen.

Q. Do you recall anything unusual about the hymenal ring?

A. I do not.

Q. Okay. Based on those observations, were you able to form an opinion as to whether there was sexual abuse in the vaginal area?

A. The examination was strongly suggestive of sexual abuse with vagina contact.

Q. Why is that?

A. The bruising of both sides of the labia, the inflammation and swelling and scarring of the fourchette, or the area around the vagina, and the small area of scarring (p. 370) in the back of the vagina.

Q. And what does that scarring - and when you say scarring you meaning that healing process?

A. The healing process that we were talking about before.

Q. And the bruises in that area, what does that indicate? What type of force would cause that type of a bruising in that area?

A. Well, the bruising of the inner surfaces of both labia suggests that forceful contact was made with the inner genital area as opposed to external trauma, such as one might experience riding a horse, or falling off a bicycle.

Q. So you're saying that actual penetration of the vaginal area caused that bruising?

A. The process of penetration may have caused that bruising. The bruising to the labia. The penetration itself may very well have caused the area of injury around the entrance area or fourchette of the vagina itself.

Q. So in your experience is it common to find - or how easy is it to break that labia minora, the inner part?

A. It is very difficult to bruise the labium minora. That's one - oh, that's part of the design of the female genital system, the labia majora act as a shock absorber for the genital region to prevent trauma from occurring to the external genitalia.

(p. 371) Q. Do you have an opinion as to how recent the trauma that you observed in that examination to the vaginal area had occurred?

A. I do.

Q. And what is that opinion?

A. It's my opinion that trauma occurred approximately two to three days prior to the examination.



Q. Were you able to ascertain whether there was any chronic abuse, ongoing abuse to that area?

A. In light of the acute injuries, chronic findings may have been masked by swelling, inflammation and bruising from the acute injuries, therefore it was very difficult to ascertain whether chronic abuse had been occurring.

Q. So would that be able to be ruled out?

A. No, it would not.

Q. And you indicated that you had examined Kathy on a separate occasion. Do you have notes to that effect?

A. I have my office notes where I had examined Kathy on - again on 3/5/87.

Q. And what did you find at that time?

A. The labia majora and minora had no bruises or redness. The vaginal fourchette appeared to be within normal limits, and the rectal examination was completely normal with no scarring, lesions, et cetera in the area around the anus, and there was a very small area of adhesion (p. 372) or perhaps scarring between the labia minora.

Q. And what did that indicate to you? Do you have an opinion as to what that indicated?

A. Yes, I do have an opinion.

Q. What is that opinion?

A. It is my opinion that this indicates that substantial healing had taken place of the injuries which I had

noted on 11/10/86, and that it was highly probable that no further trauma had occurred to the area in question.

Q. Now, did you, in your examination of Kathy on the 10th of November, did you have occasion - did she make any statement concerning her injuries?

MR. HAYNES: I think I'll object. This may be something that should come out in camera.

THE COURT: If you will take the jury out, please.

(Jury out.)

\* \* \*

(p. 386) FURTHER DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Backtrack just briefly. What type of training or experience have you had in the area of interviewing children?

A. First of all, I had the usual and customary training of all individuals who go through pediatric residency in interviewing children, eliciting information of all sorts from them. Number two, I had specific training from interviewing during my educational sessions with the (p. 387) child abuse team in Wichita, Kansas. Number three of being - talking to children practically every day for the last eight years. And there's - applying those principles to my day to day contact with children both in a professional and a nonprofessional circumstance.

Q. And what are the ages that you tend to have children - do you tend to speak with?

A. Well, I have been known to speak with infants, I speak with toddlers, small children, medium size children. I have been known to even speak with adolescents, and they occasionally speak to me.

Q. Do you find it easy to speak with children and interview them?

A. I find it incredibly easy to talk with children and interview them.

Q. Now, calling your attention then to your examination of Kathy Wright on November 10th. What – would you describe any interview dialogue that you had with Kathy at that time? Excuse me, before you get into that, would you lay a setting of where this took place and who else might have been present?

A. This took place in my office, in my examining room, and, as I recall, I believe previous testimony I said that I recall a female attendant being present, I don't recall her identity.

(p. 388) I started out with basically, "Hi, how are you," you know, "What did you have for breakfast this morning?" Essentially a few minutes of just sort of chitchat.

Q. Was there response from Kathy to that first – those first questions?

A. There was. She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, "Well, how are things at home," you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, "Do you play with

daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" And again we then established what was meant by pee-pee, it was a generic term for genital area.

Q. Before you get into that, what was, as best you recollect, what was her response to the question "Do you play with daddy?"

A. Yes, we play – I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And "Does daddy play with you?" Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed (p. 389) very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

A. Yes.

Q. What did you observe?

A. She would not – oh, she did not talk any further about that. She would not elucidate what exactly – what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.

MR. NAYLOR: Thank you I have nothing further.

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JAN 29 1990

OFFICE OF THE CLERK,  
SUPREME COURT, U.S.

In The  
**SUPREME COURT OF THE UNITED STATES**

October Term, 1989

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THE STATE OF IDAHO,

*Petitioner*

vs.

LAURA LEE WRIGHT,

*Respondent*

---

**MOTION FOR APPOINTMENT OF COUNSEL  
AND FOR LEAVE TO PROCEED  
IN FORMA PAUPERIS**

---

RESPONDENT, LAURA LEE WRIGHT moves the Court to appoint counsel to represent her before the Court and to grant her permission to proceed *in forma pauperis*.

RESPONDENT requests the Court to appoint:

Rolf M. Kehne  
1208 W. State Street  
Boise, Idaho

RESPONDENT relies upon her affidavit and the affidavit of Rolf Kehne in support of this motion.

DATED this 24th day of January, 1990.

Respectfully Submitted;



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Rolf M. Kehne  
1208 W. State St.  
Boise, ID 83702  
(208) 342-2272

6/14

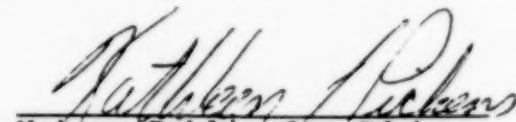
**AFFIDAVIT OF ROLF KEHNE  
IN SUPPORT OF MOTION FOR APPOINTMENT OF COUNSEL**

I, Rolf Michael Kehne, being first duly sworn, depose and say that:

1. Respondent, Laura Wright is indigent and requires appointed counsel to represent her before this Court.
2. Laura Wright was represented by a county public defender at trial.
3. I was appointed to represent Ms. Wright on her state appeal and in further state court proceedings.
4. Ms. Wright has asked me to represent her in all proceedings before this Court.
5. I am a member of the Supreme Court bar.
6. I will prepare a brief for Respondent.
7. I have briefed and argued several state court appeals over the last twelve years and I have appeared on petitions filed before this Court.

  
Rolf M. Kehne  
1208 W. State Street  
Boise, ID 83702  
(208) 342-2272

SUBSCRIBED AND SWORN before me this 24th day of  
January, 1990

  
Notary Public for Idaho  
Residing in Boise, Idaho  
My commission expires 11/13/93

IN THE  
SUPREME COURT OF THE UNITED STATES

THE STATE OF IDAHO,	)	
	)	No. 89-260
Petitioner,	)	
	)	
vs.	)	
	)	
LAURA LEE WRIGHT,	)	
	)	
Respondent.	)	
<hr/>		

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, LAURA LEE WRIGHT, being first duly sworn, depose and say that I am the Respondent in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present are the following:

A response to the Petition for Writ of Certiorari to the Supreme Court of Idaho filed by the State of Idaho.

I further swear that the responses which I have made to the questions and instruction below relating to my ability to pay the cost of responding to the Petition for Writ of Certiorari to the Supreme Court of Idaho are true.

1. Are you presently employed?

No.

- a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
- b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

I worked as an inmate for the Idaho State Board of Corrections earning less than \$100.00 per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interests, dividends, or other source?

No.

- a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts?

No.

- a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

- a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None.

I have been continuously incarcerated since I was sentenced for the offence which is the subject of the Petition. I am now in Ada County Jail awaiting retrial. The Idaho Courts found me to be indigent and I was represented by appointed counsel at trial and on appeal in proceedings below.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Laura Wright  
LAURA LEE WRIGHT

SUBSCRIBED AND SWORN to before me this 6<sup>th</sup> day of November, 1989.

John J. L. L. L.  
Notary Public for Idaho  
Residing at Boise, Idaho  
My commission expires 6-8-90



CERTIFICATE OF SERVICE

I certify that I hand delivered three (3) copies of the foregoing motion for appointment of counsel and for leave to proceed *in forma pauperis*, along with the supporting affidavits of Laura Wright and Rolf Kehne, to:

Jim Jones  
Attorney General  
M. Stahman  
Deputy Attorney General  
Idaho Statehouse, Room 210  
Boise, Idaho

DATED this 24th day of January, 1990

Respectfully Submitted;

A handwritten signature in black ink, appearing to read 'Rolf M. Kehne', is written over a horizontal line.

Rolf M. Kehne  
1208 W. State St.  
Boise, ID 83702  
(208) 342-2272

(L)  
No. 89-260

Supreme Court, U.S.

FILED

MAR 2 1990

JOSEPH F. SPANIOL, JR.  
CLERK

In The  
**Supreme Court of the United States**

October Term, 1989

THE STATE OF IDAHO,

*Petitioner,*

vs.

LAURA LEE WRIGHT,

*Respondent.*

On Writ Of Certiorari  
To The Supreme Court Of Idaho

JOINT APPENDIX

JAMES T. JONES  
*Attorney General of  
the State of Idaho*

\*MYRNA A. I. STAHPMAN  
Deputy Attorney General  
Statehouse, Room 210  
Boise, Idaho 83720  
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*Counsel for Respondent*

**Petition for Certiorari Filed August 11, 1989  
Certiorari Granted January 16, 1990**

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The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the Idaho Supreme Court in *State v. Wright*, dated June 13, 1989, now found at 116 Idaho 382, 775 P.2d 1224 (1989)..... A1

Opinion of the Idaho Supreme Court in *State v. Giles*, dated March 30, 1989, now found at 115 Idaho 984, 772 P.2d 191 (1989)..... A23



# DOCKET ENTRIES

November 28, 1986	Prosecuting Attorney's Information filed
April 30, 1987	State's Motion in Limine and Memorandum in Support
May 6,7,8,11, 1987	Jury trial
May 11, 1987	Jury verdict returned
June 1, 1987	Sentencing hearing
June 3, 1987	Judgment of Conviction and Sentence
July 6, 1987	Notice of Appeal filed
June 13, 1989	Decision of the Idaho Supreme Court

---

GREG H. BOWER  
 Ada County Prosecuting Attorney  
 Room 103 Courthouse  
 Boise, ID 83702-5954  
 Telephone: 383-1237

Filed  
 NOV 28 1986

IN THE DISTRICT COURT OF THE FOURTH  
 JUDICIAL DISTRICT OF THE STATE OF  
 IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,	)	
Plaintiff,	)	
	)	INFORMATION
-vs-	)	14013
LAURA LEE WRIGHT	)	
ROBERT LOUIS GILES	)	
Defendant [sic].	)	

GREG H. BOWER, Prosecuting Attorney in and for the County of Ada, State of Idaho, who in the name and by the authority of the State, prosecutes in its behalf, comes now into District Court of the County of Ada, State of Idaho and states that LAURA LEE WRIGHT and ROBERT LOUIS GILES are accused by this Information of the crimes of: LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508, TWO COUNTS which crimes was [sic] committed as follows:

COUNT I

That the defendants, LAURA LEE WRIGHT and ROBERT LOUIS GILES, on or between March 1986, and October 1986, in the County of Ada, State of Idaho did wilfully and lewdly, commit multiple lewd and lascivious acts upon the body of a minor, Jeannie May Wright, under the age of sixteen years, to-wit: of the age of five

(5) years, in that Laura Lee Wright held the child down while defendant Robert Louis Giles had sexual intercourse with the minor child, with the intent to gratify the sexual desire of the defendants or the minor child.

COUNT II

That the defendants, LAURA LEE WRIGHT and ROBERT LOUIS GILES, on or between March 1986, and November 8, 1986, in the County of Ada, State of Idaho did wilfully and lewdly, commit a lewd and lascivious act upon the body of a minor, Kathy L. Wright, under the age of sixteen years, to-wit: of the age of two (2) years, in that Laura Lee Wright held the child down while defendant Robert Louis Giles had sexual intercourse with the minor child, with the intent to gratify the sexual desire of the defendants or the minor child.

All of which is contrary to the form, force and effect of the statute in such case and against the peace and dignity of the State of Idaho.

/s/ Greg H. Bower  
 GREG H. BOWER  
 Ada County Prosecuting  
 Attorney

GREG H. BOWER  
Ada County Prosecuting Attorney  
Room 103 Courthouse  
Boise, ID 83702-5954  
Telephone: 383-1237

Filed  
APR 30 1987

IN THE DISTRICT COURT OF THE FOURTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,	)	
Plaintiff,	)	Cr. 14013
-vs-	)	STATE'S
LAURA WRIGHT	)	MOTION
ROBERT GILES	)	IN LIMINE AND
	)	MEMORANDUM
Defendant [sic].	)	IN SUPPORT

THE STATE moves this Honorable Court to admit into evidence at trial the hearsay statements made by the two alleged infant victims in this case, Jeannie Wright and Kathy Wright. In support of the State's motion for the admissibility of these otherwise inadmissible hearsay statements, the State cites Idaho Code § 19-3024. That statute allows the admission of statements made by a child under the age of ten years describing any act of sexual abuse after a proper foundation has been laid.

Subsection (1) specifically requires that the court find "in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability." This requirement would be satisfied where the State makes an offer of proof for the statements made by the infant. This would include who was present, where the statements took place, the circumstances under which the statements

were elicited, and the general content of the anticipated testimony by the witness who heard the statements. This offer of proof would be presented prior to any testified hearsay statement.

Subsection (2) sets forth the second prong required by Section 19-3024. "The child either testifies at the proceedings, or is unavailable as a witness." If the child testifies at the trial, the hearsay statements found reliable by the court under Section 19-3024(1) would be admissible.

If the child does not testify at the proceeding, the hearsay statements may still be admissible under subsection b. If it is determined that the witness is unavailable and corroborative evidence of the act is provided such statements may be admitted. "A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." In determining whether a witness is unavailable, Idaho Code Section 9-202 is applicable in criminal proceedings pursuant to Idaho Code 19-3001. That section excludes certain persons from testifying as witnesses. Subsection (1) excludes those persons of an unsound mind. Subsection (2) excludes children under the age of ten years "who appear incapable of receiving just impressions of the facts respecting which they are examined, or relating them truly." This section seems to parallel Section 19-3024(2)(b).

A close reading of Subsection (2)(b) can find a parallel intention of the legislature with Section 9-202. In the



unavailability language of 19-3024, a child is unavailable if the child is unable to (1) be present, or (2) to testify at the hearing. That section continues by excluding those unable to be present because of death or then existing physical or mental illness or infirmity. Section 9-202(1) excludes persons of unsound mind. That would seem to encompass the "mental illness" exclusion of 19-3024(b). The remaining language of Subsection (2)(b) includes, death or an existing physical illness or infirmity. Death or existing physical illness would be such cases where the physical presence of the child would be impossible. Finally, the term "infirmity" seems to parallel subsection 9-202(2) where the "incapacity" of certain children to testify is outlined.

The term "infirmity" in *Blacks [sic] Law Dictionary* outlines physical condition and health that would affect and [sic] applicants [sic] success in obtaining an insurance policy. The definition then refers the reader to the word "incapacity." Considering that same volume under the word "incapacity," legal incapacity is defined, "this expression implies that the person in view has the right vested in him, but is prevented by some impediment from exercising; as in the case of minor [sic], committed persons, prisoners, etc." Synonyms outlined in the definition include "want of capacity; inefficiency; and incompetency."

It is the State's position that the legislature in enacting Section 19-3024(2)(b) intended to allow hearsay statements where the child would be unable to testify. A reasonable interpretation of that statute would be that a child who has died, who is physically incapable of being present at the proceedings, or is mentally ill and excluded under Section 9-202, or (infirm) incapable of testifying as

outlined in Section 9-202(2) all would be "unavailable" to testify.

The intention of the exception to hearsay as outlined by Section 19-3024, would be to screen hearsay statements made by children under the age of ten for their reliability as Subsection (1) outlines. The second prong of this section then requires that the child testify at the proceedings allowing cross-examination. Obviously the legislature intended the jury to be afforded the opportunity to judge the demeanor and credibility of the child witness on the stand and to determine the weight to be given the hearsay statements admitted.

However, if the child is unavailable and does not testify as a witness, then the statute requires corroborative evidence of the act. Clearly, a witness excluded specifically by Section 9-202 would also be unavailable under Section 19-3024(2)(b). It would be necessary therefore, that the court under the guidelines of Section 9-202, conducts a hearing in chambers to determine whether the child qualifies as a witness.

The Idaho Supreme Court has given the following test for determining the competency of young persons to testify:

"the true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; (5) the capacity to

understand simple questions about it." See *State v. McKenney*, 101 Id. 149 at 150 (1980).

Simply put, it must first be shown that the child recognizes the duty to tell the truth. Then second, that the child has the capacity to observe, to remember and to relate. And finally, that the child has the capacity to understand simple questions about the occurrence testified to.

If this court determines either child witness to be incompetent under I.C. § 9-202, then that child would be unavailable to testify. Therefore, pursuant to § 19-3024(2)(B) her hearsay statements would then be admissible evidence.

Finally, the State here submits that such hearsay statements made by the witness who will testify are admissible prior to that infant witness testifying.

DATED This 29th day of April, 1987.

GREG H. BOWER  
Ada County Prosecuting Attorney

/s/ K Naylor  
By: KIRTLAN G. NAYLOR  
Deputy Prosecuting Attorney

IN THE DISTRICT COURT OF THE FOURTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

Filed  
MAY 12 1987

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Criminal Case
	)	No. 14013
vs.	)	VERDICT
LAURA LEE WRIGHT,	)	COUNT I
	)	
Defendant.	)	
_____	)	

WE, The Jury, sworn to try the above-entitled matter, find the defendant, Laura Lee Wright, guilty of Count I, Lewd Conduct With a Minor Under Sixteen.

Dated this 12 day of May, 1987.

/s/ Walter Mott  
FOREMAN

WE, The Jury, sworn to try the above-entitled matter, find the defendant, Laura Lee Wright, guilty of the lesser included offense of Count I of Sexual Abuse of a Child Under the Age of Sixteen Years.

Dated this \_\_\_ day of \_\_\_, 1987.

\_\_\_\_\_  
FOREMAN

WE, The Jury, sworn to try the above-entitled matter,  
find the defendant, Laura Lee Wright, guilty of the lesser  
included offense of Count I of Battery.

Dated this \_\_\_\_ day of \_\_\_\_, 1987.

\_\_\_\_\_  
FOREMAN

IN THE DISTRICT COURT OF THE FOURTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

Filed  
MAY 12 1987

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	Criminal Case
	)	No. 14013
vs.	)	
	)	VERDICT
LAURA LEE WRIGHT,	)	COUNT II
	)	
Defendant.	)	
_____	)	

WE, The Jury, sworn to try the above-entitled matter,  
find the defendant, Laura Lee Wright, guilty of Count II,  
Lewd Conduct With a Minor Under Sixteen.

Dated this 12 day of May, 1987.

/s/ Walter Mott  
FOREMAN

WE, The Jury, sworn to try the above-entitled matter,  
find the defendant, Laura Lee Wright, guilty of the lesser  
included offense of Count II of Sexual Abuse of a Child  
Under the Age of Sixteen Years.

Dated this \_\_\_\_ day of \_\_\_\_, 1987.

\_\_\_\_\_  
FOREMAN



WE, The Jury, sworn to try the above-entitled matter,  
find the defendant, Laura Lee Wright, guilty of the lesser  
included offense of Count II of Battery.

Dated this \_\_\_\_ day of \_\_\_, 1987.

\_\_\_\_\_  
FOREMAN

IN THE DISTRICT COURT OF THE FOURTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

Filed  
JUN 5 1987

THE STATE OF IDAHO,	)	
	)	
Plaintiff,	)	CASE NO. 14013
vs.	)	JUDGMENT OF
LAURA LEE WRIGHT,	)	CONVICTION
	)	AND SENTENCE
Defendant.	)	
_____	)	

The above-named matter came before the Court for sentencing June 1, 1987. The defendant appeared in person and with her attorney Lansing Hanes [sic]. The State was represented by Kirtlyn [sic] Naylor as prosecuting attorney. The record reflects the following:

An information was filed on November 28, 1986, charging the defendant with the crime of LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508. Arraignment was held on December 12, 1986, at which time the defendant appeared in person and with counsel and was advised of the charge and the possible penalties and was further advised of the applicable constitutional and statutory rights. Thereafter the defendant entered a plea of not guilty to LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508. Trial was held before the court and a jury and on the 6th day of May, 1987, the jury returned its verdict that the defendant was guilty of LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508, TWO COUNTS.

Sentencing was continued for preparation of a presentence report which was completed and reviewed by the court and counsel. Counsel for State and for the Defendant made statements and the Defendant was given the opportunity to make a statement and offer evidence in mitigation. Inquiry was made by the Court to determine if there was any legal cause why judgment should not be pronounced and there being none the Court rendered Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the defendant is guilty of the crime of LEWD CONDUCT WITH A MINOR UNDER SIXTEEN, FELONY, I.C. 18-1508, two counts. As a consequence the defendant is sentenced to the State Board of Correction for a term not to exceed twenty (20) years with credit for 162 days served prior to sentencing on Count I, and is sentenced to the State Board of Correction for a term not to exceed twenty (20) years with credit for 162 days served prior to sentencing on Count II, sentences shall run concurrent. Sentence shall commence June 1, 1987.

Dated this 4 day of June, 1987.

/s/ Gerald F. Schroeder  
GERALD F. SCHROEDER  
District Judge

IN THE DISTRICT COURT OF THE FOURTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

Office of the Clerk of the Fourth Judicial )  
District of the State of Idaho, ) ss.  
in and for the County of Ada )

I, John Bastida, Clerk of the District Court aforesaid, do hereby certify the foregoing to be a full, true and correct copy of the judgment made and entered on the minutes of the said District Court in the above entitled action, that I have compared the same with the original, and that the same is a correct transcript therefrom and of the whole thereof.

ATTEST My hand and the seal of said District Court  
this 3 day of June, 1987.

JOHN BASTIDA  
Clerk

By /s/ Sandra Connolly  
Deputy

CASE NUMBER 14013

THE STATE OF IDAHO

To the Sheriff of the County of Ada, State of Idaho, and  
the Director of the Board of Correction of the Idaho State  
Penitentiary:

WHEREAS, LAURA LEE WRIGHT, having been duly  
convicted in our District Court of the Fourth Judicial  
District of the State of Idaho, in and for said County of  
Ada, of the crime of LEWD CONDUCT WITH A MINOR  
UNDER SIXTEEN, FELONY, I.C. 18-1508, TWO COUNTS.

and [sic] judgment having been pronounced against her that she be committed to custody of the State Board of Correction of the State of Idaho for a term not to exceed twenty years with credit for 162 days served prior to sentencing on Count I, and a term not to exceed twenty years with credit for 162 days served prior to sentencing on Count II, sentences shall run concurrent.

all [sic] of which appearing to us of record, and a certified copy of the judgment being endorsed herein and made a part hereof;

NOW, THIS IS TO COMMAND YOU, The said Sheriff of the County of Ada, to take and keep and safely deliver the said LAURA LEE WRIGHT into custody of the Director of Correction of the State Idaho [sic] Penitentiary at your earliest convenience.

AND THIS IS TO COMMAND YOU, The said Director of Correction, to receive of and from the Sheriff of the County of Ada, the said LAURA LEE WRIGHT convicted and sentenced as aforesaid, and keep her in the custody of The State Board of Correction of the State of Idaho for a term not to exceed twenty years with credit for 162 days on Count I, and a term not to exceed twenty years with credit for 162 days served prior to sentencing on Count II, sentences shall run concurrent.

And these presents shall be your authority for the same, Herein fail not.

WITNESS: Hon. Gerald F. Schroeder, Judge of the District Court, at the Court House in the said County of Ada, this 1st day of June, 1987.

ATTEST my hand and the seal of said Court, the day and year last above written.

JOHN BASTIDA  
Clerk

By /s/ Sandra Connolly  
Deputy

---



Filed  
JUL 6 1987

Laura Lee Wright  
Hospital North Drive #23  
Orofino, Idaho 83544

ICIO Law Library  
for Appellant Pro Se

IN THE DISTRICT COURT OF THE FOURTH  
JUDICIAL DISTRICT OF THE STATE OF  
IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO,	)	Criminal Case
	)	No: 14013
Plaintiff-Respondents,	)	
	)	Supreme Court
-vs-	)	No:
	)	
LAURA LEE WRIGHT,	)	NOTICE OF
	)	APPEAL
Defendant-Appellant.	)	

TO: The respondents above named, THE STATE OF IDAHO, and their Attorneys, THE ADA COUNTY PROSECUTING ATTORNEY, GREG H. BOWER, (room 103 Ada County Courthouse, Boise, Idaho 83702) and the CLERK OF THE ABOVE ENTITLED COURT,

NOTICE IS HEREBY GIVEN THAT:

1) The above named defendant Laura Lee Wright hereby appeals against the above named respondents to the IDAHO SUPREME COURT from the Judgement of Conviction and the Order committing the Appellant to the care and custody of the Idaho Department of Corrections for a term not to exceed (20) years, entered in the above entitled court on or about the 12th day of May, 1987, the Honorable Gerald F, [sic] Schroeder judge presiding.

2) The Appellant has the right to appeal to the Idaho Supreme Court, and the Judgements or Orders described in paragraph (f1) are appeallable [sic] orders under and pursuant to Rule 11 (5)(c)(1) of the Idaho Appellate Rules.

3) The appellant requests the preperation [sic] of the following portions of the reporter's transcript to wit;

a. The entire reporters standard transcript as defined in Rule 25 (a) I.A.R.

4) The appellant hereby certifies that service of this Notice of Appeal has been made on the Court Reporter.

5) The appellant is exempt from paying the estimated cost of preperation [sic] of the transcripts, the estimated fee of preperation [sic] of the record, and the Appellant filing fee in this matter by the fact the appellant was found to be indigent and was granted leave to proceed in Forma Pauperis in the above entitled court.

6) The appellant hereby certifies that service has been made upon all parties pursuant to Rule 20 I.A.R.

7) The appellant certifies that a copy of this Notice Of Appeal has been served on the Attorney General of the State of Idaho pursuant to *Idaho Code* 67-1401 (1). DATED this 1 day of July, 1987

/s/ Laura Lee Wright  
Laura Lee Wright  
Appellant Pro Se

STATE OF IDAHO                     )  
COUNTY OF CLEARWATER        ) ss.

LAURA LEE WRIGHT after being duly sworn upon her oath deposes and says:

THAT she is the Appellant in the above entitled action and that all statements in this Notice of Appeal are true and correct to the best of her knowledge and belief.

/s/ Laura Lee Wright  
Laura Lee Wright  
Appellant Pro Se

---

# HEARING ON MOTION IN LIMINE

\* \* \*

(p. 9) MR. NAYLOR: Your Honor, I believe, as per our pretrial (p. 10) conference, if it's the Court's intention, I'm prepared to discuss the out - the hearsay statements made by the two children at this time, and what - and make an offer of proof as to what those statements will be testified to by the witnesses.

THE COURT: The State is relying upon Idaho Code Section 30 - 19-3024 in this area? Is the State also prepared to proceed with an offer that would potentially take the matters out of hearsay objection pursuant to Idaho Rule of Evidence 803-24?

I think I will state at this time that at least it is my understanding from the spokesman for the rules of evidence at the time that they were under consideration and subsequently adopted by the Supreme Court, that they were considered to be exclusive and preclusive of the legislature acting in areas of this nature.

Is the State relying solely upon the code section which may or may not be inconsistent with the Rules of Evidence, or is it the State - or is the State in a position to proceed with any claimed exception under Rule 803?

MR. NAYLOR: Your Honor, I believe that the offer of proof would be the same for 803, subsection 24 at this point in time as well as Idaho Code Section 19-3024.

THE COURT: Any objection to making an offer of proof (p. 11) at this time? Or did you wish to have that deferred until after the jury is selected?

MR. HAYNES: I think an offer of proof is acceptable.

THE COURT: Did you wish to make the offer?

MR. NAYLOR: Thank you, Your Honor. For the record, I would indicate that Defense Counsel has been provided copies of statements, written statements made, but I will proceed with, as well as I have been notified, that the State would be proceeding based upon Section 19-3024.

At this time the hearsay statement made by Jeannie Wright to Cynthia Goodman, first of all on November 8th, 1986. Cynthia Goodman is the girlfriend of Lewis Wright, the father of Jeannie Wright on November 8th. Testimony will be provided that Jeannie was in the custody of Cyndy and Lewis and that on this occasion, and while Cyndy was giving Jeannie a bath, Jeannie disclosed, for the first time, and to our knowledge, the events that the Defendants are charged with, specifically, perhaps I can offer into the record the written statements and proceed by outlining each one of those.

THE COURT: Mark that as offer of proof Exhibit No. 1.

(Exhibit No. 1 marked for identification.)

MR. NAYLOR: At that time, on November 8th, Cyndy was – and for the record, I've availed Mr. Haynes the copy of that Exhibit. At that time Jeannie disclosed that, as (p. 12) outlined in that statement, that Bobby had hurt her and then went into specifics relating to sexual intercourse where she was bleeding, where there was detailed statements made by her that a white gooey substance was found in her vaginal area and that it hurt; that

he would get on top of her with his clothes removed and that he would move and move and move and at that time then there would be a white gooey substance in this – her vaginal area and she would clean up by using toilet paper because of the bleeding in that area.

She stated also, as outlined in that Exhibit, that this happened before her birthday happened, more than once and that another person, Ray was named as also having done this.

Your Honor, based on that – the written statement by Cynthia Goodman of that conversation, I believe that under Rule 804 – excuse me, 803, that the statement is offered as evidence of a material fact. The allegations and the information indicate that such statements, if shown to be true, would prove the material elements of this crime as charged.

I might add that Jeannie also disclosed that her mother was present on most of the occasions and that she would participate by holding her legs, or holding her mouth if she were to scream, as well as helping her to clean up afterwards.

(p. 13) Part B, the statement is more probative offered as evidence – excuse me, more probative than any other evidence, and I believe that the statement made by Jeannie as a first hand eyewitness would fall under that, and that the interests of justice would be best served. Under Section 19-3024 as well, the code requires that this Court find at this point in time, that reliability of the statements as to their time, content and circumstances, and I believe a reading of that statement would produce that.



The second hearsay statement would be a tape recording made on November 24th, 1986. This goes - I do not have a transcript of that, but this is a tape recording made by Cynthia Goodman with Jeannie Wright in an interview fashion. I believe most properly that that is close to proximity to the time that she first disclosed to Cynthia Goodman her statements. They are consistent with the statements outlined in Cynthia Goodman's written statement and more properly that is evidence that would be essentially more probative than anything short of Jeannie Wright testifying in that the Court and the jury will be able to hear the questions that were asked, put to Jeannie, as well as her response, and be able to judge somewhat the demeanor and credibility of the witness at that time.

The third set of hearsay statements would include, on November 9th at the hospital, the report to (p. 14) Dr. Johnson, Dr. Mark Johnson who first examined Jeannie at St. Alphonsus Hospital. Cynthia Goodman was present at that time, but the principal witness testifying to that interview would be Dr. Mark Johnson. At that point in time she related, as to his questions, basically the same information of abuse, identifying the perpetrators as Bobby and her mother, Laura, and the Court's been provided with a copy of Dr. Johnson's statement outlining his conversation.

Also, in all of these statements that I've mentioned to this point, Jeannie also told the potential witnesses that this also happened to her little sister, half-sister Kathy Wright who was two years old, and basically alleging the same acts and over the same period of time from - after

her birthday, which is April 1st. She also told that to Dr. Johnson at the hospital.

Your Honor, I believe that her statements to Dr. Johnson would also come in under the hearsay exception of Rule 803, subsection four, statements for purposes of medical diagnosis or treatment where Dr. Johnson, in his physical examination, and possibly ascertaining the history behind the physical evidence that he observed as well as confirming any physical evidence in his examination was found; that her statements would help in the diagnosis and treatment at that point in time.

(p. 15) The State also will be presenting testimony by Dr. John Jambura who, on November 10th at his office in Ada County, interviewed and examined Kathy Wright, the two-year-old. At that point in time, he asked some general questions, and he has outlined those in his summary examination, which the Court has a copy of, and that he asked, in general, "Do you play with your daddy? Do you play with him outside? Do you play with him inside?" And, "Does your daddy play with you and where does he play with you?"

And the - at that point in time Kathy stated that, in response to Dr. Jambura's question, "Does daddy play with you? Yes. does daddy touch you with his pee-pee?" And, "Do you touch his pee-pee?" And the child admitted that she had been touched by her father's pee-pee, but would not explain exactly how. But then she volunteered that daddy did that a lot more to my sister than to me.

There also – the State would be relying upon the Section 19-3024 as well as Rules of Evidence 803, subsection 4 and subsection 12.

Also the statements made by Jeannie Wright on November 9th at the hospital, first to Officer Thomas Paulson of the Boise Police Department, he's in uniform. He was called to the scene at the time when, as a – Cynthia and Lewis had called the police to find out what they should (p. 16) do and they were told to take Jeannie to the hospital for examination. At that point in time, Officer Holst was called to the scene to investigate. He spoke with Jeannie, and as outlined in his police report, described the circumstances and the statements made by Jeannie to him; which are also consistent with the other statements that she had made prior to that time to Cynthia; that Bobby took her into a bedroom and took her clothes off, then mommy held me down on the bed and sometimes covered my mouth so I wouldn't scream.

Officer Holst then asked generally what happened and she stated, "Bobby stuck his thing in my pussy."

I asked Officer Holst – asked if it hurt, she nodded her head in the affirmative. He asked her when it happened, she indicated once, again, just before her birthday, which was April 1st.

This all occurred on November 9th, 1986. When asked if it happened again she nodded in the affirmative. However, she was not able to tell Officer Holst exactly how many times it happened.

Finally, Detective Larry Armstrong of the Boise City Police Department, following the physical examination of

Dr. Johnson, Dr. Jambura and Dr. Bauer at the hospital and the interview by Officer Holst, spoke with Jeannie and his report, as well as his testimony at the preliminary (p. 17) hearing indicate that he was not interviewing Jeannie for detail, but was concerned mainly at that point in time of the imminent danger and potential danger that her two-year-old half-sister Kathy was in, since she was still in the custody of the Defendants, Bobby and Laura.

And in general, she generally told to Detective Armstrong that Bobby would hurt her, made her scream, her mother would cover her mouth and that she saw Bobby hurt Kathy and she said Kathy really screamed louder than me, end quote.

Your Honor, there's also statements made by Jeannie Wright to Dr. Michael Eisenbeiss and Carol Sorini who have been – who Jeannie has been seeing for therapy. Carol Sorini is a licensed counselor, Dr. Eisenbeiss has his Ph.D. in counseling and those statements, I believe, would come in under the – in their testimony under Idaho Rules of Evidence, Rule 709, I believe it is – excuse me, 703, the basis for testimony by experts that if – of a type reasonably relied upon by experts in the particular field in performing opinions or inferences upon the subject, the fact or date need not – shall be admissible in evidence. I believe the – that those hearsay statements, the experts will testify those are forms of therapy, discussions with patients that are relied upon by experts in that field to do – make diagnosis and treatment decisions as well as for (p. 18) therapeutic advancement of the patient.

For those reasons, I believe that their statements would be admissible under that exception as well. And



the State would not be relying solely upon that rule, but inclusive of all the others stated earlier.

Those are the hearsay statements that the State intends will be – will come forward in the evidence through the State's witnesses.

THE COURT: May I take into account in the offer of proof the evidence submitted at the preliminary hearing as to the conditions that existed?

MR. NAYLOR: Yes, Your Honor. I've provided a copy of the testimony pertaining to that in the offer of proof Exhibit, but should there be any other statements or testimony at the preliminary hearing we'd ask the Court to rely upon that also.

THE COURT: Did you wish to respond?

MR. HAYNES: Your Honor, I have a couple of questions, procedural, I guess. I'm not sure it's been established pursuant to the statute who was present at several of these, and I think that's part of the circumstances. Several of these conversations, specifically the November 9th conversation with Mark Johnson who was present during that conversation. Is that okay if I ask the –

THE COURT: Certainly.

(p. 19) MR. NAYLOR: I believe that the evidence will show that Dr. Johnson was present, that Cynthia Goodman was present and Lewis Wright.

MR. HAYNES: And November 10th conversation between Dr. Jambura and Kathy Wright?

MR. NAYLOR: Dr. Jambura, I believe, was the only person present. I don't believe his nurse was present.

MR. HAYNES: The November 9th conversation with Officer Holst?

MR. NAYLOR: That, I believe, was simply Officer Holst prior to –

MR. HAYNES: And the conversation of November 9th with Detective Armstrong?

MR. NAYLOR: At that point in time it was – it's unclear who may have heard the conversation, but Lewis Wright, Cynthia Goodman and Mary Lou Pierce from the Department of Health and Welfare may have been present.

MR. HAYNES: Okay. Thank you.

The other question I have is how the date of November 24th was arrived at from the tape recording, Your Honor. I have a copy of that tape recording and I don't have any indication of the date.

MR. NAYLOR: Okay. Cynthia Goodman presented that to me on the date of the preliminary hearing, which was November 26th, and indicated that she had made it (p. 20) approximately a couple days before the preliminary hearing.

MR. HAYNES: Okay. Thank you.

Your Honor, procedurally I'm not sure at this point how the Court wants to go forward. Is this the time for me to make my specific legal objections to the 19-3024 and to the catchall hearsay exception, medical records exception?

THE COURT: You can if you wish to do so at this time, or you can wait until witnesses are actually called



and would be asked to testify. You wish to state the objection then, you can do so.

MR. HAYNES: I think I'd prefer to wait, Your Honor, until the witnesses are actually called, and I know that will require, then, another hearing outside the presence of the jury, but -

THE COURT: How long would you expect your arguments to take on those matters?

MR. HAYNES: I think it could take as much as a half hour, maybe 45 minutes, and I'm thinking long so that the Court isn't misled on that. There may be some things to present in rebuttal of the reliability of certain statements.

THE COURT: There are different exceptions claimed as to different witnesses. Will we be able to deal with - in general, with the majority of objections, each of those?

(p. 21) MR. HAYNES: Yes.

THE COURT: I can defer, then, until witnesses - there is actually an effort to call the witness. I will consider the offers under, of course, the statute and consider whether they are - would be admissible under the statute also under the Rules of Evidence and will attempt to rule on those matters covering those bases.

MR. HAYNES: Okay.

THE COURT: Anything else that should be taken up before the Jury is brought over?

MR. HAYNES: There is from the Defense, I'm not sure the Prosecutor is done yet.

MR. NAYLOR: Your Honor, simply then procedurally would the State be allowed to present any other offers of proof for reliability at the time, if there's an objection?

THE COURT: If there is an objection, yes, the State may pursue further offer of proof and have further opportunity to respond.

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## VOIR DIRE OF KATHY WRIGHT

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(p. 182) MR. NAYLOR: Your Honor, perhaps I should have mentioned this beforehand. The first witness I'd call would require to be done outside the presence of the jury.

THE COURT: Very well. If you'll take the jury out, please.

(Jury out.)

MR. NAYLOR: State would call Kathy Wright and she will be here presently.

THE COURT: Very well.

(Brief delay.)

## (p. 183) VOIR DIRE EXAMINATION

BY THE COURT:

Q. Hi, Kathy. Can you tell me your name please?

A. (No audible response.)

Q. Are you kind of scared? Can you tell me your name, and tell me how old you are?

A. Kathy Wright.

Q. Who do you have with you there that you're holding - can you tell me the names of the toys that you have that you're holding?

A. Kathy Wright.

Q. That's your name? Okay. How old are you, Kathy? How old are you?

A. My - Kathy Wright.

Q. Can you tell me the names of your father and your mother?

A. No.

Q. Do you know their names?

A. (No audible response.)

Q. Can you tell me what they are?

A. What?

Q. Do you know where you are right now?

A. No.

Q. Kathy, can you come on over here where I can talk to you a little better.

(p. 184) Can you tell me the name of this fellow? What's this guy's name? That's your teddy bear? And what's this guy?

A. Puppy Wright.

Q. Is that a puppy? Do you call him "Puppy Wright"?

A. Um-hum.

Q. Your name is Kathy?

A. (No audible response.)

Q. Can you tell me how old you are, Kathy?

A. Kathy Wright.

Q. Um-hum. Do you know how old you are? Are you on - go to school at all? Do you go to a day care center or anything?

A. No school.

Q. Okay. What do you do for fun? What do you play? I can't under - are you kind of scared being here with all these people?

A. And if - (nod of the head.)

Q. Would you rather be someplace else, playing?

A. (Affirmative nod.)

Q. Do you know how many years you've been alive?

A. Six.

Q. Six years? How old do you think you are?

A. Six years.

Q. Six years. Do you know how old these little guys (p. 185) are that you're holding? Puppy Wright, do you know how old Puppy is?

A. And if I have - (affirmative nod.)

Q. Where did you get him? Somebody give him to you?

A. (Affirmative nod.)

Q. Do you recall who gave him to you?

A. (Affirmative nod.)

Q. Come on around, take a look and see if there's anything that interests you. Do you know what this is?

Say something into that real loud. Do you know what that is? Talk real loud at that. Can you say your name into that?

A. (Negative nod.) What is it on?

Q. That will make your voice real loud if you talk into it. Ever seen one of those?

A. (Negative nod.)

Q. Did you ever watch television?

A. (Affirmative nod.)

Q. See, sometimes on television people wear those. Can you say your name into that?

A. (Negative Nod.)

Q. That's kind of hard, isn't it. Well, would you like to go someplace else other than here?

A. (Affirmative nod.)

Q. Un-hum. Can I see him for just a minute? Can you see that?

(p. 186) A. (Affirmative nod.)

Q. This says "Preppy Bear".

A. (Affirmative nod.)

Q. Has anybody talked to you about why we're visiting today?

A. (Affirmative nod.)

Q. Do you know why you're here?



A. (Affirmative nod.)

Q. Can you tell me?

A. (Negative nod.)

Q. No. Well, want to look in there?

A. (Negative nod.)

Q. Kind of an ugly thing, isn't it?

A. What's this?

Q. That's a drawer. That's a drawer and look there, see, there's a fork, a plate, just a drawer.

A. What's that?

Q. That's a tea bag. I don't know why there's a tea bag in there. I'm glad that there's nothing worse than that. Some paper, nothing very interesting is there. Can you push that closed? That's kind of heavy. I don't know if we have any more things for you to explore or not. Probably nothing more interesting. Looks like about the same type of stuff. Do you know what this is?

A. (Affirmative nod.)

(p. 187) Q. Do you know what that is?

A. (Affirmative nod.)

Q. That's a paper clip. Don't want to put that in your mouth, you know, you could choke on that. It might hurt you.

A. (No audible response.)

Q. That's a paper clip. Papers, I don't know if - that's empty. You want to look in that bottom one?

A. (Negative nod.)

Q. No? Probably empty too. Do you know what that is over there (indicating)?

A. (Affirmative nod.)

Q. What would you call that?

A. Star.

Q. Is that a star? That kind of looks like a big scarf doesn't it. Do you have any pets?

A. (Negative nod.)

Q. Don't have a pet? Don't have a pet frog, lizard?

A. (Negative nod.)

Q. Do you know what these are?

A. (Affirmative nod.)

Q. What would you call those?

A. Books.

Q. You are right, those are books. Those are called law books.

(p. 188) A. This.

Q. That's right, a lot of books. Do you know the name of the woman that you came up her with today, brought you up here?

A. (Affirmative nod.)

Q. Can you tell me her name?

A. (Negative nod.)

Q. Do you have books yourself?

A. (Negative nod.)

A. I don't - I got my own books.

Q. You have your own books?

A. At my home.

Q. At your home? Do you like your books?

A. Books.

Q. Does somebody read those books to you?

A. (Affirmative nod.) Tracy did.

Q. Um-hum. What's this? Do you know what that is? That's a watch. Have you ever seen one like this?

A. No, mine got no -

Q. Some of the watches just have numbers on them. This is a pretty dull place to be isn't it?

A. (Affirmative nod.)

Q. Why don't - would you like to get out of here and go someplace else?

A. (Affirmative nod.)

(p. 189) Q. I think I can agree with that.

THE COURT: Take a short recess at this time.

(Recess taken. Jury out.)

THE COURT: The record will reflect that the jury is not present at this time. Counsel, will you - did you wish

to be heard on the issue of whether the child is capable of testifying at this time?

MR. NAYLOR: No, Your Honor.

THE COURT: Is there any disagreement that she is not capable of communicating to the jury?

MR. NAYLOR: No, Your Honor.

MR. HAYNES: No disagreement.

THE COURT: Very well. If you'll call your next witness.

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## TESTIMONY OF JEANNIE WRIGHT

(p. 206) JEANNIE WRIGHT,

a witness called on behalf of the Plaintiff, having been first duly sworn, took the stand and testified as follows:

THE COURT: Jeannie, do you know that that means that you have to tell the truth?

A. (Witness nods head.)

THE COURT: Do you understand that?

A. (Witness nods head.)

MR. NAYLOR: Your Honor, may I approach the witness?

THE COURT: You may also if you wish to.

MR. HAYNES: Thank you.

(p. 207) DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Jeannie, here is some water. If you could sit on that big chair. Sit right there. Jeannie, can you tell me what your name is?

A. Jeannie.

Q. What's your last name?

A. Wright.

Q. And how old are you?

A. Six.

Q. When was your birthday?

A. April.

Q. Do you know the day?

A. No.

Q. Did you have a birthday?

A. Yeah.

Q. When was that?

A. I don't remember.

Q. Do you know who these people are over here (indicating)?

A. (Witness shakes head.)

Q. Is it the jury there, the jury? They're the people that you get to talk to today. Can you spell your first name?

A. Yeah.

(p. 208) How do you spell your name?

A. J-e-a-n-n-i-e.

Q. Good.

Q. And can you tell me what color my shirt is?

A. White.

Q. Do you know what color this tie is?

A. Red.

Q. Yeah. You know your colors really well. When - do you have a sister?



A. Um-hum.

Q. What's her name?

A. Kathy.

Q. And how old is she?

A. Three.

Q. Do you know when her birthday is?

A. April.

Q. Do you know the day? April 1?

A. April 6th.

Q. And does yours come first or after hers?

A. First.

Q. Oh. And who is your daddy?

A. Lewis.

Q. And who is your mom?

A. Laura.

Q. Okay. And do you know who Kathy's dad is?

(p. 209) A. (Witness nods head.)

Q. Who is that?

A. Bobby.

Q. And who is Kathy's mom?

A. Laura too.

Q. Oh. Now, do you know what telling the truth means?

A. Yeah.

Q. Do you know what telling a lie means?

A. (Witness shakes head.)

Q. What does telling the truth mean?

A. That means -

Q. Means what?

A. No lying.

Q. Okay.

Q. Can you tell me - well, what happens if you tell a lie?

A. I'll get spanked.

Q. And what happens if you tell the truth?

A. I wouldn't get spanked.

Q. You don't get spanked if you tell the truth?

A. No.

Q. Okay. Do you know what - if something is real - let me - if I said to you that there is a big white bunny right there, is that real or pretend?

(p. 210) A. No.

Q. What is that? Is that real or pretend?

A. Pretend.

Q. Okay. If I said that I'm wearing glasses, is that real or pretend?

A. Real.

Q. And is real the truth or a lie?

A. The truth.

Q. Okay. Did you have a birthday party?

A. Yes.

Q. And do you remember who was there?

A. Yeah.

Q. Who was there?

A. Benae and my mom and - and Bobby and Laura  
- I mean Roger and Sue.

Q. When you say your mom, who do you mean?

A. That's not my mom.

Q. Oh, Okay. Roger and Sue - who do you live with  
right now?

A. Bobby and Sue.

Q. Who else lives there?

A. Me and Kathy.

Q. Anybody else?

A. Amy and Jeremy.

Q. Okay. Who is Amy and Jeremy?

(p. 211) A. They are our brothers.

Q. Oh. Who is their mommy and daddy?

A. Roger and Sue.

Q. Okay. If I told you that I came to your birthday  
party would that be real or pretend?

A. Pretend.

Q. How come?

A. Because you were in court.

Q. Oh. Okay. Now -

MR. NAYLOR: May I have this marked as State's  
Exhibit No. 1.

(State's Exhibit No. 1 marked for identification.)

MR. NAYLOR: For the record, I'm showing it to  
Counsel.

MR. HAYNES: Um-hum.

Q. BY MR. NAYLOR: Jeannie, I'm showing you  
this picture. Have you ever - what is that? Do you  
recognize that?

A. (Witness nods head.)

Q. What is that?

A. That's where me and Bobby use to live, and my  
mom.

Q. Who lived there at that house?

A. Bobby and Laura and me and Kathy.

Q. Oh, okay.

(p. 212) Q. And were you living there when you  
had your last birthday? Not this birthday this year?

A. No.

Q. Okay. But were you living there during - oh, were you living there at Christmas?

A. (Witness nods head.)

Q. Okay. Was that - who were you with during Christmas, this last Christmas?

A. With Roger and Sue.

Q. Okay. And so were you living at that house during that Christmas?

A. Huh-uh.

Q. Oh, was it another Christmas?

A. Um-hum.

Q. Oh. Did that Christmas when you were living there, did that - was that before the Christmas with Roger and Sue or after?

A. After.

Q. After? Did it happen before or after?

A. Nothing happened to me after.

Q. Okay.

Q. What does private touching mean to you?

A. What?

Q. What does private touching mean?

A. I don't know.

(p. 213) Q. Okay. Have you ever talked about private touching?

A. (Witness shakes head.)

Q. Is that - is it because you've never talked about it, or don't want to talk about it right now?

A. I don't want to talk about that right now.

Q. Take a deep breath. Now, it's important for you to tell us what happened, and we only have a few questions, so will you tell us? I know it's really hard for you.

A. One time I did with you and Carol.

Q. What did you do?

A. I told you the touching happened to me and Kathy.

Q. Did that make you feel better to talk about it?

A. (Witness nods head.)

Q. Carol here today?

A. (Witness nods head.)

Q. Okay. Did you ever tell Cyndy about the private touching?

A. (Witness nods head.)

Q. Do you remember where you were when you told her about that?

A. The bathtub.

Q. Oh. And whose house was that?

A. Cyndy's house.

Q. Was that - do you remember Thanksgiving?



(p. 214) A. Um-hum.

Q. Where did you go have Thanksgiving dinner?

A. With my dad.

Q. And who is your dad?

A. Lewis.

Q. And did you tell Cindy about this private touching in the bathroom before or after that Thanksgiving?

A. After.

Q. Well, had you talked to her – did it happen – did it – did you talk to her before you went to Lewis's for Thanksgiving?

A. Um-hum.

Q. Now, is Kathy here today?

A. Yes.

Q. Where is she?

A. She's downstairs playing on the floor.

Q. Now, did any private touching happen to Kathy?

A. Yes.

Q. And who did that private touching?

MR. HAYNES: Objection; without foundation, Your Honor.

THE COURT: Overruled. She may answer.

Q. BY MR. NAYLOR: Who did that private touching, Kathy?

A. Bobby.

(p. 215) Q. And who else? Was there anyone else?

A. (Witness shakes head.)

Q. Jeannie.

A. What?

Q. Is it because no one else was there, or you just don't want to talk about that?

A. I don't want to talk about that.

Q. How do you know that Kathy was touched?

A. Because I was in my room.

Q. Were you in your room?

A. Yes.

Q. And where were they?

A. They were in my room, too.

Q. Can you tell me what Bobby did?

A. (Witness shakes head.)

Q. I know it's really hard.

A. I want to get this off (indicating).

Q. Do you want me to help you get that off? We'll tuck it right there in your socks. Okay. Did this same kind of touching by Bobby happen to you?

A. (Witness nods head.)

Q. And was anyone else there when Bobby touched you?

A. No.

Q. Where was your mommy?

A. In my room too.

(p. 216) Q. And what was your mommy doing?

A. Holding my legs and holding my mouth so I wouldn't scream.

Q. And what was Bobby doing?

A. Pumping me.

Q. What would he do when he would be on top of you?

A. I don't want to talk about that.

Q. Okay. Let's talk about something else then. Did - where did this happen?

A. In my room.

Q. In your bedroom? And whose house was that?

A. The house right there (indicating).

Q. This house in this picture?

A. Yeah.

Q. State's Exhibit 1 that's been marked? Okay.

Did this happen - when did this happen? Do you remember the first time it happened?

A. (Witness shakes head.)

Q. Do you remember, did it happen more than once?

A. (Witness nods head.)

Q. Okay. Did Bobby or your mommy ever tell you not to tell anybody about this?

A. (Witness nods head.)

Q. What did they tell you would happen if you told about this?

(p.217) A. I'd get a spankin.

Q. So did you tell anybody about this before you talked to Cyndy?

A. (Witness nods head.)

Q. Who did you tell?

A. Cyndy.

Q. Just Cyndy?

A. (Witness nods head.)

Q. After you talked to Cyndy about it, did you tell anybody else?

A. Huh-uh.

Q. Well, have you told me about it?

A. Um-hum.

Q. Oh, okay. Well, let's see if there's somebody else. Did you tell Lewis about it?

A. No.

Q. Didn't talk to him about it at all?

A. He took me to the doctor.

Q. Oh. Do you remember when that happened?

A. That was after I had take the bath.

Q. You mean the day that you took the bath and talked to Cyndy?

A. Then we - he got in from work and then we went to the doctor.

Q. Oh, is that doctor a nice doctor?

(p. 218) A. Yeah.

Q. I'll bet. Was there more than one doctor? Do you remember?

A. There's only one.

Q. Oh. And did you tell that doctor about the private touching?

A. No.

Q. Is that because you don't remember?

A. Um-hum.

Q. Well, remember you talked to the judge about telling the truth, and it's important that you remember. Was there - when - was there anybody else there at the hospital? Was there a policeman?

A. Um-hum.

Q. And what did that policeman do?

A. He didn't do anything but help me.

Q. Helped you? Are policeman good?

A. Yeah.

Q. Yeah. Did he talk to you?

A. Yeah.

Q. Did he talk to you about the touching?

A. No.

Q. Now, you remember - do you remember that or is that-not - or is that - do you remember talking to the officer?

(p. 219) Yeah.

Q. Okay. And do you remember telling him about the touching by Bobby?

A. Huh-uh.

Q. Okay. Now, when Bobby would do this private touching, be on top of you, would that hurt?

A. (Witness nods head.)

Q. And I know this is really hard, but can you tell me what would happen after he would do this? What would you do?

A. Go out and play.

Q. Okay. Do your remember telling Cyndy that you would have to clean up with toilet paper?

MR. HAYNES: That's too leading at this point.

THE COURT: Overrule if objection.

Q. BY MR. NAYLO?: Do you remember telling Cyndy that?



A. (Witness nods head.)

Q. Was that the truth when you told Cyndy?

A. (Witness nods head.)

Q. Can you tell us about that?

A. (Witness shakes head.)

Q. Is that because you can't - don't want to talk about it?

A. (Witness nods head.)

(p. 220) Q. Jeannie, can you tell me one thing that you would do to clean up just one thing?

A. We had to clean up cause my mom asked me to.

Q. So would your mommy help you?

A. (Witness nods head.)

Q. Is that Laura?

A. Um-hum.

Q. And what would she do to help you?

A. She - she didn't do anything.

Q. She would what?

A. Do A, B, C's.

Q. Do A, B, C's? Would Laura give you any toilet paper to help you?

A. (Witness shakes head.)

Q. Okay. Now when you saw Bobby and your mommy doing the private touching to Kathy, do you remember what Kathy was doing?

A. (Witness shakes head.)

Q. Do you remember telling Cyndy that Kathy was screaming too?

A. Um-hum.

MR. HAYNES: Objection. Again leading, Your Honor.

THE COURT: Overrule the objection.

Q. BY MR. NAYLOR: When you told Cyndy that, did that really happen?

(p. 221) A. (Witness nods head.)

Q. You're doing really good, Jeannie. I want you to tell me about school. Let's talk about school for a minute. Do you like to go to school?

A. Yes.

Q. What are some things you do at school?

A. I have to do what my teacher asks me to do.

Q. And does she have you draw pictures?

A. Yes, or somebody that's moving.

Q. Who was moving. Do you know?

A. One people moved is named Jeff and then other people moved, her name is Amber.

Q. Oh. Jeannie did this private touching, did it happen before or after your birthday last year?

A. After my birthday.

Q. Was that the first time it happened?

A. What?

Q. Did it happen before your birthday too?

A. Um-hum.

Q. And when you say this happened to Kathy, did that happen before or after your birthday?

A. After my birthday.

Q. Was that while you were still living with Bobby and Laura and Kathy in that house in that picture?

A. (Witness nods head.)

(p. 222) Q. Did any private touching happen any place other than in your bedroom there, that house?

A. Huh-uh.

Q. Has Lewis ever touched you like that?

A. (Witness shakes head.)

Q. Is that the truth, or do you just don't want to talk about it?

A. I don't want to talk about it.

Q. Can you tell me, has anybody else touched you like that?

A. No.

Q. Do you remember telling Cyndy that Ray also touched you like that?

A. Huh-uh.

MR. HAYNES: Objection. As leading.

THE COURT: Overrule the objection.

Q. BY MR. NAYLOR: You don't remember that?

A. (Witness shakes head.)

Q. Okay. You're doing really good. Are you nervous -

A. (Witness nods head.)

Q. - and kind of scared?

A. (Witness nods head.)

Q. Well, you don't have to be. Now, do you remember coming to live with Lewis and Cyndy just last year?

(p. 223) A. Yes.

Q. Okay. Do you remember Halloween?

A. Yes.

Q. Did you dress up for Halloween?

A. Yes.

Q. What did you dress up like?

A. A witch.

Q. A witch? And did Kathy dress up like something too?

A. A witch too.

Q. Oh. Where were you living? Who were you living with?

A. Cyndy.

Q. Cyndy and Lewis?

A. (Witness nods head.)

Q. Okay. When Bobby and Laura would do this to you, would that be during the daytime or at night time? Do you remember?

A. (Witness shakes head.)

Q. What would you be wearing?

A. My pajamas.

Q. Oh, okay. So would that be because you were going to bed?

A. (Witness nods head.)

Q. Do you remember what Bobby would wear?

(p. 224) A. Huh-uh.

Q. Is that hard to think about?

A. (Witness nods head.)

Q. Can you just tell us what you remember just - can you think of one time that it happened? Just tell us on that time what Bobby would be wearing?

A. He was wearing shorts and shirt.

Q. Shorts and a shirt? Okay. And would he take off his shorts or his shirt?

A. (Witness shakes head.)

Q. Where did - where - can you tell me where the private touching would happen on you?

A. Down below.

Q. Down below? Can you point for us?

A. (Witness shakes head.)

Q. Is that hard to do?

A. (Witness nods head.)

Q. Was it - can you tell me if it was like below your waist down here (indicating)?

A. (Witness shakes head.)

Q. Do you not want to talk about that?

A. Huh-uh.

Q. Tell me - just a few more questions, okay, and we'll be all done?

A. (Witness nods head.)

(p. 225) Q. Tell me what Bobby would do that would hurt? Why would it hurt?

A. Because he got on top of me.

Q. And what would he do?

A. That's hard to talk about.

Q. I know it's hard to talk about. Can you just tell us - tell me about this and we'll talk about something else, okay?

A. (Witness nods head.)

Q. Okay. So tell me when he'd got on top of you, where would it hurt?



A. Down below.

Q. Can you tell me why it would hurt?

A. Because.

Q. Did he touch you with his finger?

A. Um-hum.

Q. Did he touch you with anything else?

A. (Witness shakes head.)

Q. Is that hard to talk about?

A. (Witness nods head.)

Q. Is that - well, when he was on top of you, what would he be doing?

A. That's hard to talk about.

Q. Can you? I know it's hard, but you're just really good. Can you tell us, just think of one time and (p. 226) tell us what he would be doing when he'd be on top of you?

A. He was hurting down below.

Q. He was down below?

A. Yes.

Q. Okay. Do you remember when you were staying with Lewis and Cyndy after Halloween, or during Halloween? Do you remember that time?

A. Yes.

Q. Okay. Did any of the private touching happen to you then?

A. No.

Q. And do you remember telling - well, do you remember when you saw the private touching with Bobby and Laura and Kathy, what would Laura be doing?

A. She would be holding Kathy's leg and holding her mouth so she wouldn't scream.

Q. Okay. Now, when you're telling us about what you saw happen to Kathy, is that real, or is that pretend?

A. Real.

Q. Is that a lie?

A. (Witness shakes head.)

Q. When you tell us what happened with Bobby and Laura to you, is that pretend?

A. Um-hum.

Q. Is that - what did you say? Is that pretend or (p. 227) real?

A. That's real.

Q. Is it hard to talk about?

A. (Witness nods head.)

Q. You're doing really good. Did you ever see - when you saw this happen to Kathy did you see it happen more than once?

A. Yes.

Q. Did it - do you know - do you know how many five is?

A. Um-hum.

Q. How many is five? Can you show fingers?

A. (Witness complied.)

Q. Five. Did it happen five times?

A. Um-hum.

Q. Did it happen not as many as five times?

A. Huh-uh.

Q. Oh, okay. Did it happen more than five times?

A. Huh-uh.

Q. Are you getting tired?

A. (Witness nods head.)

Q. Okay. I just have two more questions, okay?

A. (Witness nods head.)

Q. Okay. Do you love your sister Kathy?

A. Yes.

(p. 228) Q. Good friends?

A. Yes.

Q. When did you ever see - do you remember telling Cyndy that you would bleed?

MR. HAYNES: Object as leading.

THE COURT: Overrule the objection.

Q. BY MR. NAYLOR: Is that hard to talk about, or did - or is that the truth?

A. Um-hum.

Q. Was it the truth when you told Cyndy?

A. Huh-uh - yeah.

Q. Well, was it real or pretend? Did it really happen?

A. Yes.

Q. Where would you bleed?

A. Down below.

MR. NAYLOR: Okay. You did really well, thanks. Can we take a short recess?

THE COURT: Take a brief recess.

( Jury out. )

MR. NAYLOR: Did you want to get a drink of water?

THE WITNESS: Huh-uh.

MR. NAYLOR: Your Honor, is there any problem with having her take a little break?

THE COURT: No. If she wants to go out in the hallway.

(p. 229) MR. HAYNES: Instruct her not to talk about testifying.

THE COURT: It should be understood that there will be no discussion about further testimony during this break.

MR. NAYLOR: Thank you, Your Honor.

THE COURT: Are you done questioning?

MR. NAYLOR: Yes, I am.

THE COURT: There is to be no discussion as to testimony then.

MR. NAYLOR: Okay.

THE COURT: Take a short recess.

( Recess taken. )

MR. NAYLOR: Your Honor. I have one matter. I'm not through on my direct.

THE COURT: Very well.

( Jury in. )

THE COURT: Counsel, will you waive roll call of the injury [sic]?

MR. HAYNES: Yes, Your Honor.

MR. NAYLOR: Yes, Your Honor.

THE COURT: Wish to proceed?

#### FURTHER DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Jeannie, I just have a couple more questions (p. 230) you're doing really well, okay. Now, you said that Bobby would touch you down below. Okay.

A. (Witness nods head.)

Q. Do you remember telling Cyndy you used a different word for down below on Bobby?

A. (Witness nods head.)

Q. Can you tell me what that word is?

A. I can't.

Q. I know it's really hard, but you told Carol about that and you have told me about that before?

A. (Witness nods head.)

Q. And you just need to tell the Judge and these people today. Okay? What other word do you mean when you say down below?

A. I can't remember.

Q. Is it because you don't remember, or you don't want to say it?

A. I don't want to say it.

Q. I know this is hard for you, it's hard for me too, but we're doing it, right?

A. (Witness nods head.)

Q. Okay. Now, what's another word for down below?

A. I can't remember it.

Q. Do you remember telling Cyndy?

A. Yes.

(p. 231) Q. When you told Cyndy that word, was that the truth or a lie?

A. The truth.



Q. Will you tell me, is that word - would that be the same on a boy as it is on a girl? Do you know that?

A. (Witness nods head.)

Q. Jeannie?

A. What.

Q. Just a couple more questions, okay?

A. (Witness nods head.)

Q. Bobby would touch you down below, would he be touching you with something that is down below on him?

A. Huh-uh.

Q. Now, is that because it didn't happen? Can you tell me that, because it didn't happen -

A. (Witness nods head.)

Q. - or because you don't want to talk about it?

A. I don't want to talk about it.

Q. When you told Cyndy that, was that the truth?

A. (Witness nods head.)

Q. How old are you now?

A. Six.

Q. And how old were you when this private touching was happening?

A. Five.

(p. 232) Q. And do you know how old Kathy is now?

A. Yes.

Q. How old is Kathy?

A. Three.

Q. And how old was she when you saw Bobby and Laura touching her?

A. Two.

Q. Would your mother be there all the time?

A. Yes.

Q. Okay. Now, here is the last question.

A. Then I'm all done?

Q. With me, and then Landy, you remember Landy? You talked to Landy before, haven't you?

A. (Witness nods head.)

Q. Yeah, he's really nice. He's going to ask you some questions, okay? But I just have this last question. Okay?

A. (Witness nods head.)

Q. When you said that Bobby touched you with his - what was down below, what's that word that you told Cyndy?

A. I don't want to talk about that.

Q. Okay. I know it's really hard; this is the last question -

A. Then I'm all done.

Q. Yeah. Would – you just need to tell me that. I (p. 233) know it's really hard to talk about, but just tell me that word that you used, okay?

A. (Witness nods head.)

Q. What was that word?

A. I don't want to talk about it.

Q. Say it really fast, and then it will be all over.

A. I don't want to do that.

Q. Jeannie, I know this is hard for you. Is that – is the thing you're talking about that's down below, is that usually under clothes?

A. (Witness nods head.)

Q. And do you have that same thing?

A. Huh-uh.

Q. Do – are boys different than girls?

A. (Witness nods head.)

Q. And is that what makes them different –

A. (Witness nods head.)

Q. – that thing? And when you talked to – take a deep breath, that makes you feel better?

A. (Witness shakes head.)

Q. No, you don't want to do that either?

A. (Witness shakes head.)

MR. NAYLOR: Okay. Jeannie thanks, you've done really well, okay. Thank you. Now Landy wants to talk to you, okay?

(p. 234) A. (Witness nods head.)

# CROSS EXAMINATION

BY MR. HAYNES:

Q. Hi, Jeannie.

A. Hi.

Q. Can I ask you a few questions too?

A. (Witness nods head.)

Q. Are you okay?

A. (Witness crying.)

THE COURT: Let's take a short recess.

MR. NAYLOR: Your Honor, would it be appropriate to have her therapist talk to Jeannie, not about testifying, but simply to calm her down?

THE COURT: Yes.

( Recess taken. Jury in. )

THE COURT: Counsel, wish to proceed?

MR. HAYNES: Your Honor, did you want to wait for Mr. Naylor?

MR. NAYLOR: I'm here.

MR. HAYNES: Sorry.

## CROSS EXAMINATION

BY MR. HAYNES:

Q. Jeannie, I'm going to stand here so I can see (p. 235) you, is that okay?

A. Okay.

Q. Feeling better?

A. (Witness nods head.)

Q. Do you remember me?

A. (Witness nods head.)

Q. Do you remember where you met me?

A. (Witness nods head.)

Q. Where?

A. At Carol's office.

Q. Okay. Was anybody else with me?

A. (Witness nods head.)

Q. Do you remember who that was?

A. Kirt was there.

Q. All right. Okay. What made you cry just now, Jeannie? What are you feeling that made you cry?

A. Nothing.

Q. Okay. Can you tell me about it?

A. (Witness shakes head.)

Q. Are you afraid of something?

A. (Witness nods head.)

Q. What are you afraid of?

A. I'm scared.

Q. Okay. Who's Benae?

A. That's my friend.

(p. 236) Q. Does Benae work with Kirt?

A. (Witness nods head.)

Q. Okay. How many times have you talked with Benae about this?

A. A lot of times.

Q. A lot of times about the touching?

A. (Witness nods head.)

Q. Okay. How many times have you talked with Kirt about it?

A. A lot of times too.

Q. Okay. Did Kirt and Benae bring you to court another day?

A. Um-hum.

Q. Okay. What happened that day?

A. Nothing.

Q. What did you do here at court?

A. I had to talk to Kirt.

Q. Did you come into a courtroom?



A. (Witness nods head.)

Q. Were there people there?

A. (Witness shakes head.)

Q. No people. What did you talk to Kirt about in the courtroom?

A. About the touching.

Q. Okay. Did Benae help you with that?

(p. 237) A. (Witness shakes head.)

Q. Was Benae there?

A. (Witness nods head.)

Q. What did she do?

A. She just sit there and watched me.

Q. Okay. When you lived in the house in the picture with Bobby and Laura, who else lived with you?

A. Amy - not Amy, Kathy and me.

Q. Kathy and who?

A. And me.

Q. Okay. And would you go visit Lewis ever when you lived with Bobby and Laura?

A. (Witness nods head.)

Q. Did you sometimes leave Bobby and Laura to go visit Lewis?

A. (Witness shakes head.)

Q. You'd never go visit Lewis?

A. (Witness shakes head.)

Q. Would you ever live at Lewis and Cyndy's house?

A. (Witness nods head.)

Q. Do you remember the last day that you lived with Bobby and Laura?

A. (Witness shakes head.)

Q. Do you remember Lewis coming to get you that day?

A. (Witness nods head.)

(p. 238) Q. What happened when Lewis came to get you?

A. I can't remember.

Q. Okay. Is Lewis and Cyndy in the courtroom today?

A. (Witness nods head.)

Q. Are they sitting right over there?

A. (Witness nods head.)

Q. Do you not remember because you don't want to talk about it?

A. (Witness shakes head.)

Q. Is that a yes or no?

A. No.

Q. Okay. Now this private touching that you talked to Cyndy about. Did you tell it to Cyndy, or did Cyndy bring it up with you?

A. I told it to Cyndy.

Q. Okay. And what did she say?

A. She didn't say anything.

Q. Okay. Did she help you with any words?

A. (Witness nods head.)

Q. What words did she help you with?

A. She didn't - she helped me a little bit but she took me to the doctor.

Q. She did what?

A. They taken me to the doctor.

Q. Okay. How did she help you? How did she help (p. 239) you talk about it?

A. Nothing, but I had to tell her.

Q. Okay. Why did you have to tell her?

A. Because she wanted me to ask her.

Q. Okay, Jeannie, I'm having a hard time hearing you. I'm going to step over here a little closer, okay?

A. Okay.

Q. Why did you have to tell her?

A. Because she wanted me to.

Q. Okay. Did you have to tell Lewis about the touching?

A. Yeah.

Q. Why did you have to tell Lewis?

A. Because I wanted to.

Q. Okay. What did Lewis do when you told him about it?

A. Nothing.

Q. Okay. Then do you remember going to the doctors and the police officer being there?

A. Yeah.

Q. Who else was there?

A. Nobody else.

Q. Okay. Did you tell the doctors and police officers?

A. My dad was there.

(p. 240) Q. Is that Lewis or Bobby?

A. Lewis.

Q. Okay. What do you call Bobby? Is he Daddy Bobby?

A. He's not my dad.

Q. Have you ever called him Daddy Bobby?

A. Huh-uh.

Q. Never?

A. He's my sister's daddy.

Q. Okay.

A. Not mine.

Q. When you used to live there, did you used to call him Daddy Bobby?

A. (Witness shakes head.)

Q. All right. Is that true, that you did not call him that?

A. (Witness shakes head.)

Q. Okay. Do you every remember calling him Daddy Bobby?

A. (Witness shakes head.)

Q. What did you used to call him when you lived there?

A. Step daddy.

Q. Okay. When Bobby was supposed to come in and eat dinner and you would call him to come have dinner, what (p. 241) would you call him?

A. Step daddy.

Q. Okay. Okay. Did Lewis and Cyndy ever talk to you about Bobby?

A. (Witness shakes head.)

Q. Never ever talked to you? Do you remember them talking to you or do you not want to talk about it?

-A. I don't want to talk about it.

Q. Okay. Do you remember you and Cyndy talking about the touching with a tape recorder?

A. Yeah.

Q. Do you know what a tape recorder is?

A. Yes.

Q. What is it?

A. It types up everything you say.

Q. Could you hear yourself after you talked into the tape recorder?

A. (Witness nods head.)

Q. Did she have you talk about the touching into the tape recorder?

A. (Witness nods head.)

Q. All right. Did you get to hear your own voice then?

A. (Witness nods head.)

Q. Okay. Is that a yes?

(p. 242) A. (Witness nods head.)

Q. All right. Was that fun to hear your own voice?

A. (Witness nods head.)

Q. How many times did you get to hear your own voice?

A. One time.

Q. Okay. Did you every tell anybody that Bobby did not do those things to you, did not do private touching?

A. (Witness shakes head.)



Q. Was that because you were afraid to talk about it?

A. (Witness nods head.)

Q. Okay. What do you think would have happened to you if you had said "Bobby did not hurt me"?

A. What did you say?

Q. Okay. If you had told people "Bobby did not hurt me," would anything have happened to you?

A. No.

Q. Okay. When you said this touching would happen to Kathy, do you know how many times it would happen to Kathy?

A. Yes.

Q. Okay. How many?

A. Five.

Q. All right. Was it - could it have been as many (p. 243) as ten?

A. No.

Q. Could it have been once? Only once?

A. No.

Q. Couldn't have been only once? Did you see it every time?

A. No.

Q. Okay. How many times did you see it?

A. One time - no, two times I mean.

Q. One or two times?

A. Um-hum.

Q. Did you ever say that Ray - let me ask you who Ray Carlton is. Do you know him?

A. Yes.

Q. Who is he?

A. He's my friend.

Q. Do you remember when you used to visit him?

A. Um-hum.

Q. Where did you live then?

A. In that house.

Q. In the same house as in the picture?

A. (Witness nods head.)

Q. Do you remember living in a house right before that, another house?

A. No.

(p. 244) Q. Where did Ray live when you lived in the house in the picture?

A. In the trailer.

Q. Okay. Did he live across the street from you?

A. No, he lived a long way -

Q. All right?

A. - away.

Q. Did he ever live across the street from you?

A. No.

Q. Did you tell anyone that Ray did private touching on you?

A. Huh-uh.

Q. Did you ever talk about Ray and you to anybody else?

A. No.

Q. Did you ever talk to Linda or Deborah Hamby about Ray?

A. (Witness shakes head.)

Q. Can you remember?

A. Huh-uh.

Q. Did you ever talk to Cyndy or Lewis about Ray Carlton?

A. (Witness shakes head.)

Q. Did you ever talk to the police officers about Ray?

(p. 245) A. Yes.

Q. All right. What did you tell the police officers?

A. That the touching too.

Q. About Ray touching you too?

A. (Witness nods head.)

Q. What happened when Ray touched you?

A. He - it's hard to talk about it.

Q. Okay. Did you tell the police officers that Ray did the same things that Bobby did?

A. Yeah.

Q. Okay. Do you like Ray?

A. No.

Q. Was he a friend of yours?

A. No.

Q. Okay. Do you remember who Mrs. Nacano is?

A. Yes.

Q. Who was she? Who was Mrs. Nacano?

A. That was Lewis -

Q. You and Billy would go to her as a teacher. Was she your teacher too?

A. Yes, but, now, I'm not going there, I'm going to Whitney School.

Q. Who did you live with when Mrs. Nacano was your teacher?

(p. 246) A. Cyndy and Lewis.

Q. Okay. What boys live at Cyndy and Lewis's house?

A. Jared and Billy.

Q. How old are they?

A. I don't know how old Billy and Jared are.

Q. Are they older than you?

A. Jared is two and I don't know how old is Billy.

Q. Okay. Were there any other boys that would live there?

A. No.

Q. Any of Cyndy's boys?

A. (Witness shakes head.) Only those two boys.

Q. Only those two?

A. I got a brother that doesn't live with Lewis, doesn't live with Cyndy.

Q. Okay. How old is he?

A. He's two.

Q. Two years old?

A. No, I think one.

Q. All right.

A. And his name is Lewis like my dad's name.

Q. Were there ever any older boys, older than you that lived with Lewis and Cyndy?

A. Huh-uh.

Q. Okay. Is Billy your age?

(p. 247) A. I don't know how old.

Q. Did he go to your class in school?

A. Huh-uh.

Q. Oh -

A. He goes to his own school.

Q. Was he in the same class you were?

A. Yes.

Q. You had Mrs. Nacano?

A. (Witness nods head.)

Q. Okay. Did any boys at Lewis and Cyndy's house ever do any private touching with you?

A. (Witness shakes head.)

Q. Never?

A. (Witness shakes head.)

Q. Are you afraid to talk about that? Are you afraid to talk about that?

A. (Witness nods head.)

Q. Did you ever have any baby-sitters at Lewis and Cyndy's house?

A. (Witness shakes head.)

Q. Okay. Nobody would ever watch you while Cyndy and Lewis were gone?



A. Some people would.

Q. Okay. Do you remember their names?

A. (Witness shakes head.)

(p. 248) Q. Were they men?

A. (Witness shakes head.)

Q. Were they ladies?

A. (Witness nods head.)

Q. Ever remember a man being there named Chuck?

A. What? Was he our counseling service?

Q. I don't think so. I don't think so.

A. I don't know him.

Q. Okay. Okay. Do you like Cyndy?

A. (Witness nods head.)

Q. Have you always liked Cyndy?

A. (Witness nods head.)

Q. Have you ever told anybody that you don't like Cyndy?

A. (Witness shakes head.)

Q. Okay. If you are in trouble at Lewis and Cyndy's house, if you get in trouble what happens to you?

A. I'll get in trouble.

Q. Okay. What happens to you when you get in trouble?

A. I get spanken.

Q. With a hand?

A. (Witness nods head.)

Q. With a belt?

A. Sometimes I get spanked with a belt.

(p. 249) Q. Okay. Who would do that spanking?

A. My dad.

Q. And that's Lewis?

A. (Witness nods head.) Sometimes he will do it, but not most.

Q. I'm sorry, Jeannie, I didn't hear that. Sometimes what?

A. Sometimes he does it and sometimes he - he does a little bit, but he doesn't now.

Q. Okay. Would Cyndy ever spank you with a belt?

A. Huh-uh.

Q. Never?

A. (Witness shakes head.)

Q. Are you afraid to talk about that?

A. (Witness nods head.)

Q. Okay. When you would be living at Lewis's and Cyndy's house and then sometimes would you go back and live with Bobby and Laura?

A. (Witness nods head.)

Q. Would Lewis ever tell you to go home and say things to Bobby and Laura?

A. (Witness shakes head.)

Q. Okay. Maybe things that weren't very nice?

A. (Witness shakes head.)

Q. Do you remember any of those things?

(p. 250) A. (Witness shakes head.)

Q. Are you afraid to talk about those things?

A. (Witness nods head.)

Q. Okay. You do know who Carol is, right?

A. (Witness nods head.)

Q. You go and play with her and talk about things with her?

A. Yes.

Q. Is she in court here today too?

A. Yeah.

Q. Okay. Just a little while ago when these people went out into another room, who came up and hugged you?

A. Carol.

Q. Carol did. And was she telling you that you were doing a really good job?

A. (Witness nods head.)

Q. Okay. Did she tell you after I got to talk, ask you questions and talk with you, did she tell you that everything would be okay then?

A. (Witness nods head.)

Q. Okay. When you've talked with Carol about the touching, would she give you hugs then?

A. (Witness nods head.)

Q. Okay. Would she tell you you were doing a really good job when you talked about the touching?

(p. 251) A. (Witness nods head.)

Q. Okay. Did you ever tell her that the touching with Bobby that you've talked about, did you ever tell her that that really didn't happen?

A. What?

Q. Did you ever tell Carol that the touching with Bobby never really happened?

A. Huh-uh.

Q. Okay. Were you afraid to talk about that?

A. Come - (Witness nods head.)

Q. When you talked about the police and the doctors about the touching, was Lewis and Cyndy there?

A. (Witness nods head.)

Q. Did you tell the police and the doctors that it never really happened?

A. (Witness shakes head.)

Q. Were you afraid to talk about that?

A. (Witness nods head.)

Q. Did you ever talk with Kathy about the touching?

A. (Witness shakes head.)

Q. Okay. Did you ever - did you ever show her what happened to you, what you say has happened to you?

A. (Witness shakes head.)

Q. Has she ever talked with you about it?

A. (Witness shakes head.) She doesn't know how to (p. 252) talk about the touching.

Q. Okay. So, she - did she ever talk about Ray, Kathy?

A. (Witness shakes head.)

Q. Because she doesn't know how, is that why she doesn't talk about it?

A. (Witness nods head.)

Q. Okay. This is sort of an embarrassing word. Can I say sort of an embarrassing word?

A. (Witness nods head.)

Q. Do you know what the words French Kissing mean?

A. (Witness shakes head.)

Q. Have you ever talked to Linda about that, Linda Hamby?

A. (Witness shakes head.)

Q. Are you afraid to talk about that now?

A. (Witness nods head.)

Q. When you would use the word for private parts, there are certain words that you've used before. Do you remember those words?

A. (Witness shakes head.)

Q. Do you not just want to talk about them?

A. (Witness shakes head.)

Q. Are you embarrassed to say them?

A. (Witness nods head.)

(p. 253) Q. Who helped you with those words, the words that you don't want to say?

A. Nobody did.

Q. Did you just think them up all on your own?

A. (Witness nods head.)

Q. Is that when you talked with Cyndy about this?

A. (Witness nods head.)

MR. HAYNES: Okay. I don't have any other questions; thanks, Jeannie.

# REDIRECT EXAMINATION

BY MR. NAYLOR:

Q. Jeannie, remember that tape recording that Landy asked you about?



A. Yes.

Q. You played with Cyndy when you talked into the tape recorder. Was that the truth or the lie?

A. The truth.

MR. NAYLOR: I don't have any other questions.

MR. HAYNES: No recross. Thank you.

THE COURT: Jeannie, you can step down. You're done, you can leave.

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# TESTIMONY OF DR. JOHN PHILLIP JAMBURA

(p. 354) JOHN PHILLIP JAMBURA,

a witness called on behalf of the Plaintiff, having been first duly sworn, took the stand and testified as follows:

## DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Would you state your full name and spell your last for the record?

(p. 355) A. John Phillip Jambura, J-a-m-b-u-r-a, M.D.

Q. What is your field of occupation or profession?

A. I am a general pediatrician practicing in Boise, Idaho.

Q. And what is your educational background?

A. After completing baccalureate [sic] study at Eastern Oregon State College I went to the University of Oregon Health Science Center School of Medicine. I graduated from that school in 1979 with the degree Doctor of Medicine, I then proceeded to the University of Kansas School of Medicine in Wichita where I served a three-year residency from 1979 to 1982. During that three years I spent extensive periods of time, both in educational sessions with the child abuse team, and also in active involvement in the examination and as a witness in a number of child abuse cases. I then proceeded to Boise in 1982, and since July of 1982 I have been in private

practice in Boise, Idaho where I have also had the opportunity to be involved in a number of child abuse cases.

Q. How long did you work with the child abuse team while you were at Kansas?

A. I was involved with the child abuse team at Wesley Medical Center virtually during my entire residency, from 1979 to 1982.

Q. So that was part of your specific training during (p. 356) that period of time?

A. That's correct.

Q. And during that period of time would you be able to estimate how many children you examined?

A. I made 6 court appearances and filed 12 reports which were indicative of approximately 50 children which I'd examined during that three-year period.

Q. So it's been your - it's been your experience to examine potential or suspected sexual abuse or physically abused victims and find no physical evidence?

A. It has.

Q. Are you a member of any professional fraternities or organizations?

A. I'm a member of the Ada County Medical Society, the Idaho Medical Association, I'm a member of the professional section of the American Diabetes Association.

Q. So your field of expertise is in pediatrics?

A. That's correct.

Q. Have you, since coming to Boise, then come in contact with suspected sexually or physically abused children?

A. I have.

Q. And on how many occasions, if you can recall?

A. Upwards of 100 occasions, I would say, in the last five years.

(p. 357) Q. Now, this may be a hard question, but is there, in your opinion, anyone else in the Ada County area that is as qualified, or more qualified in this area than yourself?

A. I would say there is one person and that would be Dr. Thomas Cornwall.

Q. Do you have a specific routine examination when you are examining a female child suspected of sexual abuse?

A. I do.

Q. And from what source, resource have you arrived at that routine?

A. I was trained in the routine examination of the female with possible physical or sexual abuse by my instructors in Kansas.

Q. Call your attention to November 9th, 1986. Were you called to Saint Alphonsus Hospital to consult with Dr. Mark Johnson and Dr. Bill Bayer?

A. I was.

Q. And did you examine a female child at that time?

A. I did.

MR. NAYLOR: May the Bailiff show the Witness State's Exhibit 2.

(Brief delay.)

Q. BY MR. NAYLOR: Do you recognize that picture?

A. I do.

Q. And is that the same person you examined on (p. 358) November 9th?

A. It is.

Q. Who else was present during that physical examination in the room?

A. There were - Dr. Johnson was present, there were one or two nurses and there were two people who identified themselves as her parents.

Q. And testifying here today, what reports are you relying upon?

A. I'm relying upon my dictated note of 9 November, 1986 on Jeannie M. Wright. I also have before me my dictated office notes of 11/10/86 on Kathy Wright and dictated office notes on 3/5/87 on both Jeannie and Kathy Wright.

Q. Now, on 3/5/87, that report, did you examine both children or just Jeannie Wright?

A. I have before me records of examinations on both children.

Q. Would you describe what, if anything, you found in your examination of Jeannie Wright on November 9th in respect to the anal area? And if it's helpful, and there's no objection, you might be able to use the paper behind you to diagram. There's a -

A. All right. As I look at my note from that day there are two things that I have recorded in my note. The (p. 359) first one is that the anal sphincter has a decreased wink, w-i-n-k.

To explain anal sphincter, normally when one strokes in an area around it, it will contract as a reflex action. This is what's known as the anal wink. If one notices a decreased anal wink it means that for some reason there has been an overriding of that normal reflex loop.

The second thing that I noticed was a somewhat corrugated appearance to the anal sphincter. Now, normal anal sphincter should have just a very sharp appearance as one looks at it. The anal sphincter as I saw it, and I am exaggerating this a little bit for the purposes of illustration. I use a broader line here, this is - if you can appreciate the fact that this is a bit rougher, if one were to blow this up even further one would see (indicating) the somewhat humped or corrugated appearance to the anal sphincter. This is suggestive of scarring and chronic trauma to the anal sphincter.

Q. Doctor, are you able to determine, from that examination, the aging of that scarring?

A. It's rather difficult to do in terms of how recent. One would probably say that at the very latest the last time that any trauma had occurred to the anus was six



weeks prior to that. It's more likely in the three to six week span because nothing - no acute trauma was noticed.

(p. 360) Q. And what would cause that type of trauma to the anal area?

A. While accidental trauma can cause these sorts of findings it's rather rare. The usual cause of such finding is nonaccidental trauma.

Q. For example?

A. Chronic sexual abuse or chronic physical abuse of that area in particular.

Q. And what type of instrument or object would be necessary to make that kind of trauma?

A. One could have chronic digital penetration, one could have chronic penile penetration, or one could use some sort of blunt object and chronically be penetrating the anus.

Q. By "digital penetration" you mean by finger penetration?

A. That's correct.

Q. Now, would a stool, a bowel movement cause that same type of trauma as you saw it in Jeannie?

A. It is highly unlikely.

Q. Why is that?

A. The - some more pictures for your benefit.

Q. You can just rip that.

A. If you could preserve that, we'll want to use that later. Thank you.

(p. 361) Now, final portion of the bowel, rectum, anus, (indicating). If one has a large bowel movement it will cause tearing forces which will be most marked at the point of least stretch at the anal sphincter, therefore there will be tearing here (indicating) and tearing here (indicating). There may also be some tearing circumferentially.

If that's torn it becomes even more sensitive than usual. First of all, that because it's more sensitive one will have an even tighter anal wink than usual. The skin around the anus will become hypersensitive to stimulation. Secondly, one will see jagged tears of skin, or if one examines the inside one will see some tearing and inflammation of the mucus lining, and one may also see some linear or horizontal tears of the mucus lining of the anus as opposed to the scarring that we see here. Secondly, if this indeed heals up it should heal without scarring.

Q. Okay. Thank you. Did you then examine the genital area of Jeannie?

A. I did.

Q. And what did you observe there?

A. On my examination of the genital area there were no lesions of the labia minora. May I have my previous drawing back? Put that here.

MR. NAYLOR: Perhaps we could mark those State's Exhibits 5 and 6 for illustrative purposes.

(p. 362) (State's Exhibits 5 and 6 marked for identification.)

THE WITNESS: On examination the labium majora which I'll mark with a capital M or the major lips, showed no bruises, no tears, no lesions at any point. The labium minora, which I'll mark with a small m were reddened and somewhat inflamed. The fourchette or the area of entry around the vagina was not swollen; however, one could not see a hymenal ridge in the hyman [sic] also known as in more common parlance as as [sic] the maden [sic] head the symbol of virginity which is broken during first sexual contact or it can also be broken by small trauma. On the back of the vagina some scarring which I list as synechiae in my report was noted.

Q. BY MR. NAYLOR: What type - and was that all you observed?

A. That is all that I observed at that time.

Q. Thank you. Now you said that the hymenal ring - you can go ahead and sit down, thank you. The hymenal ring may be broken by accident. What type of accident would cause that?

A. Many young girls that go horseback riding will rupture the hymenal ring while horseback riding, it can be ruptured by bicycle accidents where the child is jolted from the seat of the bike and comes down forcefully in the crotch area on the cross bar of the bicycle.

(p. 363) Q. So could that have possibly caused that trauma to Jeannie?

A. It's possible.

Q. Now, you indicated - well, based then on your observations, do you have any conclusion or opinion about whether Jeannie was sexually abused in the vaginal area?

A. The synechiae or scarring in the back area of the vagina is strongly suggestive of that.

Q. Okay. What is that?

A. The scarring in the vaginal area, the absence of a hymenal ring is very unusual. The accidental means of disruption or rupture of the hymen do not cause residual scarring. The residual scarring tends to be an after effect of some sort of vaginal penetration on a continuing basis.

Q. And is that what you encountered in Jeannie's case?

A. That is correct.

Q. Do you have an opinion whether there was a continued penetration to the vaginal area?

A. On the basis of the reddening and inflammation of the labia minora, it is possible that acute penetration had occurred.

Q. And was there evidence of any chronic sexual abuse?

A. The scarring in the back of the vagina, as well (p. 364) as the corrugated appearance of the anal sphincter

and its decreased anal wink, both strongly suggest chronic sexual abuse.

Q. Now, the scarring in the hymenal ring in the vaginal area. Can you tell us approximately how long it takes for this scarring that you observed to form? Was there any dating process available?

A. We usually use the process of wound healing, which has been well documented to discuss these sorts of things. It takes six weeks to form a mature scar. The scar that was found in the posterior area was not completely mature as yet. So one could give some approximate dating in the realm of, say, two to three weeks.

Q. Now, as far as chronic, is there any indication - is there any way to tell whether abuse has been occurring over a month's period of time?

A. By that do you mean occurring over the period of 30 days, or over the period of many 30-day periods?

Q. Well, you saw Jeannie on November 9th. Was there any evidence, physical evidence, that you observed that would indicate to you that the sexual abuse, the chronically occurring sexual penetration to the vaginal area had been occurring frequently?

A. From my examination I - I think it's highly possible that vaginal penetration had been occurring on a (p. 365) relatively regular basis.

Q. When you say "relatively regular" what do you mean by that?

A. I would say more than once a week.

Q. And over what period of time?

A. I would have to say over a period of weeks. I could not give you a definite number of weeks.

Q. Was there indications from the scarring - does the scarring take - some scarring take three to six months to heal?

A. That's correct. It takes three to six months to form a mature scar which is more fully integrated into the surrounding tissue.

Q. And did you find evidence of such scarring in the vaginal area of Jeannie Wright?

A. I did not.

Q. And when you say penetration of the vaginal area, what type of abuse would that - would cause that trauma?

A. Again one could have either chronic digital penetration or chronic penile penetration.

Q. What did you find when you examined Jeannie Wright again on March 5th, 1987?

A. At that time she had marked improvement of the anal wink, the anal sphincter had healed considerably and appeared much less corrugated. The synechial scar - a (p. 366) synechial scar on the anal sphincter had matured and the genital examine [sic] was remarkable only for a small amount of scarring in the back of the vagina.

Q. And what did that indicate to you?

A. That indicated that, A, substantial healing had taken place of the injuries I had previously seen, and B I



would find it unlikely that much, if any, other penetration had occurred of either the vagina or the anus.

Q. Now, do you have an opinion as to the outside – based on your examination on November 9th when the – was there any indication of when the earliest abuse had occurred to the vaginal area?

MR. HAYNES: When was the first time that she had been abused?

MR. NAYLOR: Yes, sir, the most remote. From the most remote time, from the time that you examined her on November 9th? Do you need –

THE WITNESS: Could you rephrase that for me?

Q. BY MR. NAYLOR: What evidence, if any, led you to any conclusion of – or opinion as to when the – oh, well, the oldest scarring I guess is what I'm saying, the oldest scarring that was present indicate? You said that some scarring takes three to six months, and was there any indication of that type of a period of time since some trauma had occurred, three to six months?

(p. 367) A. No.

MR. HAYNES: May I ask a question in aid of objection?

THE COURT: Very well.

MR. HAYNES: Can you answer that question about when this particular subject was first traumatized in the vaginal area with any medical certainty?

THE WITNESS: As to the first date?

MR. HAYNES: The first time, I think that was Counsel's question, can you date when she was first traumatized if in fact she was? Can you answer that with any degree of medical certainty?

THE WITNESS: No, sir I cannot.

MR. HAYNES: I'll object to the question, Your Honor.

THE COURT: I think he already said that he couldn't in answer to the earlier question. Sustain the objection but the answer is in.

MR. HAYNES: Thank you.

Q. BY MR. NAYLOR: Was there anything remarkable about the size of the opening of the vaginal area for a five-year-old?

A. Would I say that qualitatively it did appear larger than the average five-year-old's vaginal opening quantitatively I did not measure it.

Q. Were you able to form an opinion from that?

A. I was.

(p. 368) Q. And as to any sexual abuse what would that opinion be?

A. I would say that again there's – it would create a strong suspicion that sexual abuse had occurred.

Q. Now, as to Kathy Wright – perhaps would the Bailiff show Dr. Jambura State's Exhibit 3.

(Brief delay.)

Q. BY MR. NAYLOR: Do you recognize that picture?

A. I do, sir.

Q. Okay. And did you examine her on November 10th, 1986?

A. Indeed I did, sir.

Q. Do you recall where that was?

A. I recall that it was in my office.

Q. Was anyone else present?

A. There was a female attendant, I do not recall her identity and myself and the child. As I recall, her sister was not there during that time.

Q. And what type of exam did you perform on Kathy?

A. I examined her genital area as well as her anal, rectal area.

Q. And what did you find in the anal area?

A. The anal area showed no scarring or other sort of lesions, and she had normal sphincter tone on rectal examination.

(p. 369) Q. And what, if any, opinion were you able to formulate from that examination?

A. From that examination I think it's highly unlikely that any nonaccidental trauma had occurred to the anal area.

Q. And turning then to the genital exam. What did you find at that time?

A. She had some redness and some bruises that were in the early stage of healing on the inner surface of the labium majora and the labium minora, there was some scarring in the back portion of the vagina as we've mentioned - or as we've discussed previously. The healing area around the vagina was inflamed and swollen.

Q. Do you recall anything unusual about the hymenal ring?

A. I do not.

Q. Okay. Based on those observations, were you able to form an opinion as to whether there was sexual abuse in the vaginal area?

A. The examination was strongly suggestive of sexual abuse with vaginal contact.

Q. Why is that?

A. The bruising of both sides of the labia, the inflammation and swelling and scarring of the fourchette, of the area around the vagina, and the small area of scarring (p. 370) in the back of the vagina.

Q. And what does that scarring - and when you say scarring you meaning that healing process?

A. The healing process that we were talking about before.

Q. And the bruises in that area, what does that indicate? What type of force would cause that type of a bruising in that area?

A. Well, the bruising of the inner surfaces of both labia suggests that forceful contact was made with the

inner genital area as opposed to external trauma, such as one might experience riding a horse, or falling off a bicycle.

Q. So you're saying that actual penetration of the vaginal area caused that bruising?

A. The process of penetration may have caused that bruising. The bruising to the labia. The penetration itself may very well have caused the area of injury around the entrance area or fourchette of the vagina itself.

Q. So in your experience is it common to find - or how easy is it to break that labia minora, the inner part?

A. It is very difficult to bruise the labium minora. That's one - oh, that's part of the design of the female genital system, the labia majora act as a shock absorber for the genital region to prevent trauma from occurring to the external genitalia.

(p. 371) Q. Do you have an opinion as to how recent the trauma that you observed in that examination to the vaginal area had occurred?

A. I do.

Q. And what is that opinion?

A. It's my opinion that trauma occurred approximately two to three days prior to the examination.

Q. Where you able to ascertain whether there was any chronic abuse, ongoing abuse to that area?

A. In light of the acute injuries, chronic findings may have been masked by swelling, inflammation and bruising from the acute injuries, therefore it was very

difficult to ascertain whether chronic abuse had been occurring.

Q. So would that be able to be ruled out?

A. No, it would not.

Q. And you indicated that you had examined Kathy on a separate occasion. Do you have notes to that effect?

A. I have my office note where I had examined Kathy on - again on 3/5/87.

Q. And what did you find at that time?

A. The labia majora and minora had no bruises or redness. The vaginal fourchette appeared to be within normal limits, and the rectal examination was completely normal with no scarring, lesions, et cetera in the area around the anus, and there was a very small area of adhesion (p. 372) or perhaps scarring between the labia minora.

Q. And that did that indicate to you? Do you have an opinion as to what that indicated?

A. Yes, I do have an opinion.

Q. What is that opinion?

A. It is my opinion that this indicates that substantial healing had taken place of the injuries which I had noted on 11/10/86, and that it was highly probable that no further trauma had occurred to the area in question.

Q. Now, did you, in your examination of Kathy on the 10th of November, did you have occasion - did she make any statement concerning her injuries?



MY. HAYNES: I think I'll object. This may be something that should come out in camera.

THE COURT: If you will take the jury out, please.

(Jury out.)

MR. HAYNES: Your Honor, I'm going to object to any hearsay statements made by Kathy to this witness. I don't think there's any hearsay exception that allows it unless it's pertinent directly to diagnosis of medical trauma, maybe that exception, and I have specific exceptions under the statute, 19-3024.

Basically, Your Honor, I'm objecting, she's not a competent person to testify. If she's not competent in court today to be cross-examined, she is not competent just (p. 373) because an adult repeats what she says. The source, original source, Kathy is not competent by ruling of this Court, and I don't think it should come in through any other source either. There's no indicia of reliability at all as of now.

THE COURT: Did you wish to respond?

MR. NAYLOR: Your Honor, first of all I believe that the statements to the doctor could be admitted under the hearsay exception for medical diagnosis. As to the incompetency of Kathy, in State versus Bouchard, 31 Washington Appellate Court, 381, 639 P.2d at 761 in 1982; that court held that the attending physician was allowed to testify that a three-year-old child brought to him for treatment of a perforated hymen told him grandpa did it.

In this case, as an offer of proof, the statements made to Dr. Jambura will indicate not only the nature and the source of the trauma going to his diagnosis of the

physical observations that he formulated, but I believe where Defense Counsel is going to is the identification of the perpetrator of that. The Statements that she made as far as being hurt in that area caused by another person go to benefit the doctor in his formulating a medical opinion and for her strength - excuse me, for his - the strength of his determination.

Also in that case, State versus Bouchard, citing (p. 374) Johnson versus Olds three [sic] - 457 P. 2d 194 a 1969 case. In that case the Court held that the declarant herself, an infant, was determined to be incompetent to testify; however, that that [sic] I can see to testify did not prohibit the use of her excited utterances from another exclusion to the hearsay rule under the rules of evidence. And therefore relying upon that and the logic there that based on the statements made to Dr. Jambura, the credibility of those statements would be - would go to weight and credibility that the jury would be - as fact finders would make the final determination. So relying upon 803-84 that the statements indicate the cause of, or external source of the injury for a necessary proper treatment, as well as the fact that those statements, as determined by the jury would be able to make the best determination of their credibility.

THE COURT: Did you wish to respond?

MR. HAYNES: Yes. Two areas, Your Honor. In the area of whether this statement of who the perpetrator is, is admissible under the medical diagnosis or under some exception to the hearsay rule. I would first remark that the reason for that rule, as I understand it, is that a person is unlikely to be misleading to a physician about

injury because they want to be healed. That has nothing to do with who the perpetrator is, a person, there's no indicia of reliability on who the perpetrator is, that they would (p. 375) reveal to a doctor or their injuries. I think any statements she made about her injury, about physical discomfort, about pain is to the furtherance of diagnosis. Who did this to her does not further the diagnosis at all. It doesn't matter who did this to her, for the doctor's purposes of diagnosing whether she was sexually abused. So I don't think it's covered under that.

Similarly, Your Honor, I would cite a 4th Circuit case, cite *Ellison versus Sachs* at 769 et seq. 955, 4th Circuit, 1985.

In that particular case a five-year-old girl was declared incompetent by the State trial court. Your Honor, the court allowed, however, a police officer to testify that the child had told him that she had been sexually assaulted and that the defendant was the perpetrator. Maryland Appellate Court upheld that, but the 4th Circuit overturned that holding that it was the constitutional error to admit the testimony of the officer concerning the child's statements in a unanimous decision they found that the victim's out-of-court identification and statement were not reliable and therefore held that the admission of hearsay violated *Ellison's* 6th Amendment right to confront witnesses; especially, [sic]

Your Honor, where the sole evidence of the perpetrator is the out-of-court statement. And in this instance I think (p. 376) the sole evidence of the perpetrator here has come from, in this particular instance, Kathy to Dr. Jambura. If

he's allowed to say that, with some corroboration by Jeannie, whatever weight is given to that.

So, Your Honor, I think it is denying us the 6th Amendment right of confrontation, and effective confrontation for this witness to relate what an incompetent witness has told him, especially when there's no indicia of specific training as an interviewer, no indicia of reliability at all around the circumstances when the statements were made. And so for those two reasons I think this should be disallowed, no real exception for the perpetrator under the hearsay rules, and the incompetency of the witness does not make her out of state [sic] – just because she's made an out of state [sic] comment, the fact that she's incompetent and adult can repeat that does not allow it, even under 1930.4.

THE COURT: In the Maryland case was there physical evidence of sexual abuse also present?

MR. HAYNES: Your Honor, I don't think I know. I will find out for you though, but I don't know if there was also physical evidence of sexual abuse.

THE COURT: Do you have a copy of the decision there?

MR. HAYNES: Your Honor, I just have a – I can't think of the word for it, it's part of an article that I've (p. 377) read. I don't have a copy of that either. I just have the article. I've read the decision, I do not have a copy with me, Your Honor. I don't recall, frankly, whether there was evidence of – medical evidence of abuse.

THE COURT: Did you wish to respond?

MR. NAYLOR: No, Your Honor.



THE COURT: Do you, by any chance, have a copy of the decision?

MR. NAYLOR: No, I don't believe we have the federal supplement in our library.

THE COURT: Let's take a short recess and see if we can determine that 769 Fed. 2d 955?

MS. MEEHAN: Judge it's possible if it's that important I can run over there.

THE COURT: Appreciate it if you would, thank you.

(Recess taken.)

THE COURT: In reviewing the case of State versus - Ellison versus Sachs I think probably the best way to summarize it is to read significant aspects of it. To begin on Page 957 at the first full paragraph says, "Here however, as the district court documented in careful detail, there are serious discrepancies which indicate that the victim's out-of-court statements and identification of Ellison were not at all reliable. The obvious limitations in observation expression and understanding of a five year old help explain (p. 378) the various discrepancies in her descriptions. But they also underscore the care with which courts must approach the question of introducing such hearsay, particularly when largely untested by cross-examination.

"In contrast to the identification itself we find no 'inherent unreliability' in the victim's out-of-court statement corroborated by physical evidence that a sexual assault occurred. Indeed, several courts and commentators have observed that a young child's description of a

sexual assault may, in particular circumstances, contain its own inherent verity." citing authorities.

"Here, we have no occasion to chart the instances where such hearsay might contain its own particular guarantee of trustworthiness. It is controlling, however, to note in the present case that where her identification was the sole evidence of the perpetrator's identity, the victim's testimony contained no sufficient assurance of accuracy."

It's unfortunate that the Court in that case did not detail enough facts to really help us much, but there are some things that can be gleaned from this limited federal court opinion.

I don't think it is expressed, but I think it is apparent that the Court was dealing with Rule 803 under our Rule Sub 24 "Other Exceptions" to hearsay. I'll simply read (p. 379) that portion of the Rule into the record so that there is an understanding of what I'm talking about. "Other exceptions: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantee of trustworthiness, if the Court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interest of justice will best be served by admission of the statement into evidence." Continues, "However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide



the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and particulars of it, including the name and address of the declarant."

The sole issue that concerned the Court in the Ellison case concerning the out-of-court statements relates to identification. Unfortunately the federal court does not give us the benefit of telling us, I don't believe, and I've only had a few minutes to read this case since it was just cited, whether the defendant was known to the victim or not.

(p. 380) I gather, since identification was an issue that it's a fair assumption that the defendant was not related to the victim or otherwise in a situation to be well known by the victim.

It is significant, I think, that where there was other evidence to support the reliability of the out of state - or out-of-court statements, that the federal court found no imparity in allowing those statements, they were corroborated by physical evidence, and, therefore, those statements apparently complete the reliability test, inherent reliability test pronounced by the Court.

The Sixth Amendment right to confrontation is clearly not absolute, as is apparent from other exceptions to the hearsay rule, which have been upheld, and as clear from the ruling of the Ellison case itself. In that case as to identification I found that the problem was the sole evidence of the perpetrator's identity was the statement of the child. In this case I'll simply analyze briefly what other indicia of reliability there may or may not exist.

First, I will comment that I do not think that the ruling of incompetency [sic] to testify in court is preclusive of admission of statements out-of-court if they meet the reliability test. In this case, of course, there is physical evidence to corroborate that sexual abuse occurred. It also would seem to be the case that there is (p. 381) no motive to make up a story of this nature in a child of these years. We're not talking about a pubescent youth who may fantasize. The nature of the statements themselves as to sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up. This is simply not the type of statement, I believe, that one would expect a child to fabricate.

We come then to the identification itself. Are there any indicia of reliability as to identification? From the doctor's testimony it appears that the injuries testified to occurred at the time that the victim was in the custody of the Defendants. The sister Jeannie has testified as to identification of perpetrators. Those - the identification of the perpetrators in this case are persons well known to the child Kathy. This is not a case in which a child is called upon to identify a stranger or a person with whom they would have no knowledge of their identify or ability to recollect and recall. Those factors are sufficient indicia of reliability to permit the admission of the statements. It's then up to the jury to determine if they are sufficiently reliable to give weight to, in their determinations, and will overrule the objection.

MR. HAYNES: Your Honor, may I be allowed to make a further record with respect to the few questions of this witness regarding reliability?

(p. 382) THE COURT: Very well.

MR. HAYNES: Thank you.

# VOIR DIRE EXAMINATION

BY MR HAYNES:

Q. Dr. Jambura, specifically you asked questions of Kathy to gain information from her?

A. That's true.

Q. And the questions - I see four in your report of 11/10. Do they include, or were the questions, "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? And do you touch his pee-pee?" Were those the four questions that you recall asking?

A. Those are four of the questions I recall asking, and so recorded in my note.

Q. All right. Did you elucidate, I guess, or expound on what you mean by "play with daddy"?

A. I asked that question as an open-ended question because it could be, you know, I wanted to see what her response would be. You know, play baseball, throw the ball back and forth, you know, allow her to respond to that. So that as a general open-ended question to see where she would go with it.

Q. That's sort of a yes or no question. How did you determine that to be open-ended?

(p. 383) A. I look at that as being open-ended because most of the children, if I asked them that question, don't just say yes or no. Children of Kathy's age when you given them a question like that tend to take any opportunity to run with the conversation.

Q. What training do you have in interviewing?

A. Well, first of all as every pediatric resident is trained how to interview, and, you know, talk with children to get information out of them of all sorts. Number two, had the specific training from the child abuse team in Wichita. Number three, I've talked to children every day for the - about the last eight years.

Q. Is that to gather diagnosis, data?

A. Besides just talking to them.

Q. Okay. Did you determine if Kathy knew what pee-pee meant?

A. Yes.

Q. Okay. What did she say?

A. Well, I drew her a picture and she drew a picture of the penis and she said yes and then we said - we also determined that pee-pee was the word that was used for genital area.

Q. Okay.

A. With her as well.

Q. Do you have that picture?

(p. 384) A. I do not. It was drawn on my examining table and then rolled up and thrown away.

Q. Okay. And you don't have that reflected in your notes of her identifying pee-pee on a picture, do you?

A. No, sir.

Q. And she would not give you any information regarding the exact method of being touched, exact method of sexual contact, right?

A. That's correct.

Q. Okay. Along another line then. Does - did it assist your diagnosis to know who the perpetrator was and assist your examination?

A. Pardon me for pondering that one, Counselor. I'm trying to gather exactly what you're asking.

Q. Did it help you to know that daddy touched me as opposed too any man touched me, or had sexual contact with me? Did the identity of daddy assist your diagnosis in any way?

A. To the extent that one usually sees sexual abuse taking place among family members, yes.

Q. Okay. Did it assist your medical diagnosis that sexual abuse took place as opposed to a determination that daddy was the perpetrator? In other words, could you have come to the same conclusion and done the same examination without Kathy naming daddy, the same conclusion that she had (p. 385) been sexually offended against?

A. I could have come to a similar conclusion but with less weight.

Q. How did daddy add weight to the medical observations?

A. It again reflects back on the thought that non-accidental trauma is more likely in the realm of the family member than the non-family member; that the additional information that a family member may have been involved makes one think in realms - in the realms of relative probability.

Q. What would your opinion have been, can you say, if daddy had not been mentioned?

A. For example if she - I had none of this history and a negative discussion with the child?

Q. No. Just in terms of no discussion with the child?

A. Again I would have said - again it's the realm - it's not so much a qualitative difference of sexual abuse versus no sexual abuse, but of a quantitative difference of how strongly I would - how strong my opinion would be in that regard.

Q. All right.

MR. HAYNES: That's all the record. Thank you.

THE COURT: I guess I should specify, if I haven't, (p. 386) that sub 24 of 803 requires that it is of equivalent circumstantial guarantees of trustworthiness as areas covered through in the preceding sections, and under the circumstances of this case there, at least as trustworthiness as, for example, sub 2 excited utterance, sub 3 then existing mental emotional or physical condition. I think probably a sub 11, sub 12, sub 13, sub 20, sub 19, sub 21.



Bring the jury back in, please.

(Jury in.)

THE COURT: Wish to proceed? Waive roll call of the jury?

MR. NAYLOR: Yes, Your Honor.

MR. HAYNES: Yes, Your Honor

#### FURTHER DIRECT EXAMINATION

BY MR. NAYLOR:

Q. Backtrack just briefly. What type of training or experience have you had in the area of interviewing children?

A. First of all, I had the usual and customary training of all individuals who go through pediatric residency in interviewing children, eliciting information of all sorts from them. Number two, I had specific training from interviewing during my educational sessions with the (p. 387) child abuse team in Wichita, Kansas. Number three of being - talking to children practically every day for the last eight years. And there's - applying those principles to my day to day contact with children both in a professional and a nonprofessional circumstance.

Q. And what are the ages that you tend to have children - do you tend to speak with?

A. Well, I have been known to speak with infants, I speak with toddlers, small children, medium size children. I have been known to even speak with adolescents, and they occasionally speak to me.

Q. Do you find it easy to speak with children and interview them?

A. I find it incredibly easy to talk with children and interview them.

Q. Now, calling your attention then to your examination of Kathy Wright on November 10th. What - would you describe any interview dialogue that you had with Kathy at that time? Excuse me, before you get into that, would you lay a setting of where this took place and who else might have been present?

A. This took place in my office, in my examining room, and, as I recall, I believe previous testimony I said that I recall a female attendant being present, I don't recall her identity.

(p. 388) I started out with basically, "Hi, how are you," you know, "What did you have for breakfast this morning?" Essentially a few minutes of just sort of chitchat.

Q. Was there response from Kathy to that first - those first questions?

A. There was. She started to carry on a very relaxed animated conversation. I then proceeded to just gently start asking questions about, "Well, how are things at home," you know, those sorts. Gently moving into the domestic situation and then moved into four questions in particular, as I reflected in my records, "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" And again we then established what was meant by pee-pee, it was a generic term for genital area.

Q. Before you get into that, what was, as best you recollect, what was her response to the question "Do you play with daddy?"

A. Yes, we play - I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And "Does daddy play with you?" Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed (p. 389) very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

A. Yes.

Q. What did you observe?

A. She would not - oh, she did not talk any further about that. She would not elucidate what exactly - what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.

MR. NAYLOR: Thank you I have nothing further.

(P. 390) CROSS-EXAMINATION

BY MR. HAYNES:

Q. How long, Doctor, will the reddening and inflammation in the labia majora and minora last after trauma?

A. You're referring to the exam of Kathy Wright on 11/10/86?

Q. More to the exam of Jeannie on 11/9, but in general?

A. Okay.

Q. What does the redness indicate to you about time?

A. That indicates to me that it's usually happened within one to three days. There was, in the particular case of Kathy, there had been some mild resolution of the reddening without some swelling. So I put it more precisely to two or three days.

Q. Okay. Now, did you make dictated notes on this discussion with Kathy on November 10, '86?

A. I made a dictated note summarizing the conversation but not putting it down in excruciating detail.

Q. What types of things did you choose to note, the important things?

A. I try to note an overview of the conversation that would allow me to recollect it in a situation such as this, with specifics of questions that would be particularly (p. 391) pertinent.

Q. And pertinent responses?

A. That's correct.

Q. All right. You don't have the picture that was drawn any more, where you essentially drew a male figure with genitalia attached?

A. That's correct.

Q. It was thrown away?

A. It is.

Q. Unretrievable at this point? It's not stored at your office?

A. No, it is not stored at my office somewhere. It's gone with the trash.

Q. All right. And of the pertinent responses that you chose to note, am I correct that you did not note that the child's attitude in any way changed with specific questioning?

A. My note does not reflect any change in the child's affect or attitude.

Q. Okay. Now your testimony today is that your examination of Kathy is strongly suggestive of sexual trauma?

A. That's correct.

Q. Did you write that same terminology on November 10?

(p. 392) A. On November 10th I wrote, "Probable sexual abuse on this child reason corroboration is also distinguished from historical evidence from her sister."

Q. Did you also put in the line above that "Suggesting possible sexual contact approximately two to three days ago."

A. That is correct.

MR. HAYNES: Thank you. No further questions [sic]

#### REDIRECT EXAMINATION

BY MR. NAYLOR:

Q. Did you make a report of your examination and the statement, some of the statements that you've made here that Kathy made on November 10th, 1986?

A. I did.

Q. And in that report did you indicate some statement in paren that "see quotation marks" excuse me?

A. I did.

Q. What was the purpose for noting those quotation marks?

A. So that I could give an exact quotation of what was said at that point.



Q. In that report, other than the four questions that you've already testified to, is it true that in quotes are the words "her father's pee" end quote?

(p. 393) A. Yes.

Q. As well as quote "Daddy did this a lot more with her sister than with herself" end quote?

A. That's correct.

MR. NAYLOR: Nothing further.

MR. HAYNES: Yes.

#### RECROSS EXAMINATION

BY MR. HAYNES:

Q. Before you interviewed Kathy, had you already interviewed Jeannie?

A. I had not interviewed Jeannie, no.

Q. Okay. When you interviewed Kathy, did you have a preconceived idea that sexual abuse had occurred on Kathy?

A. That's a difficult one for me to answer, Counselor. Pardon me for taking a moment.

Q. Had Jeannie told you about it on the ninth?

A. No. When I had gotten Jeannie two other physicians had interviewed her and she was not in the most communicative state.

Q. Okay.

A. I did not feel it was appropriate to pester her with questions.

Q. Okay. Can I glean from your questions that you asked specially questions regarding daddy's pee-pee that (p. 394) that was at least a concern in your questioning that daddy was an offender?

A. May I answer your question in somewhat indirect fashion, Counselor? As I think here, let me try to reconstruct for you, as best I can, the thoughts that were going through my mind when I interviewed Kathy Wright.

I had seen Jeannie the day before. And I had an exam in my mind that said, "hum, possible sexual abuse." Now, I also said to myself, "Hey, there's always the possibility that this may not have happened." Therefore, to the best of my ability I have to - I'm trying to give you my internalizations here.

I have to remove from my mind as much bias as possible, or at least negate it, so I can just approach this child with - and try to do it with a blank mental slate. You sort of go through the systematic way of doing things that I know how to do and let the results fall out as they may. So, in as far as any human being imperfect as we are is capable of being objective, I made every effort to force myself to be objective in that interview.

Q. So in your objectivity then you specifically named - asked about daddy, you played with daddy's pee-pee, right?

A. That's correct.

Q. Did you ask about Lewis's pee-pee?

(p. 395) A. I didn't use the term Lewis. I used the generic term daddy.

Q. Okay. Did you ask about any babysitter's pee-pee?

A. I did not.

Q. Did you ask about grandpa's pee-pee?

A. I did not.

Q. Did you ask about a neighbor's pee-pee?

A. I did not.

MR. HAYNES: I have no further questions.

MR. NAYLOR: Just one.

#### FURTHER REDIRECT EXAMINATION

BY MR. NAYLOR:

Q. When you say possible or probable sexual abuse on Kathy Wright from your November 10th examination, what do you mean by possible? How sure are you, Doctor, of that abuse?

A. My note on 11/10/86 reflects a flow of thought as I was going through the examination. At the point in which I was looking at the fourchette, I look at the fourchette, I am noticing that it's swollen and inflamed and the first thing that goes through my head is the possibility of sexual abuse exists here. I pass by that, continue the exam, finish it. I then come to the point in time where I sit (p. 396) down, sift the evidence and say, "Given what I see here and given, you know, my experience and medical judgment what's my assessment of this

situation?"? [sic] At that point given that flow of events I then say it is probable, probable to me being equal to strongly suspicious that sexual abuse may have taken place.

Q. Do you have a stronger phrase that you would use if you felt stronger about that?

A. I would apply modifiers to the probable saying such things as very probable, highly probable.

MR. NAYLOR: Okay. Thank you.

MR. HAYNES: Nothing more, Your Honor.

THE COURT: You may step down.

MR. NAYLOR: Is this a witness that may be excused?

THE COURT: Any objection?

MR. HAYNES: No.

THE COURT: You're free to go if you wish to.

\* \* \*

## TESTIMONY OF STEPHEN DAVID THURBER

(p. 738) STEPHEN DAVID THURBER,

a witness called on behalf of the Defendants, having been first duly sworn, took the stand and testified as follows:

## DIRECT EXAMINATION

BY MR. HAYNES:

Q. Sir, will you please state your name and spell your last name?

A. Steven David Thurber, T-h-u-r-b-e-r.

Q. And where do you live and what town?

(p. 739) A. Live in Boise.

Q. How long have you been in this area?

A. About 16 years.

Q. What is your occupation at this time?

A. I'm a licensed clinical child psychologist. I'm director of clinical programming at Northwest Passages Adolescent Hospital.

Q. What education did you gather to allow you to conduct this type of an occupation?

A. I have Bachelor of Science and Master of Science degrees from Brigham Young University, I have a Ph.D. degree from the University of Texas at Austin. My program at the University of Texas was sponsored by the National Institute of Mental Health, was approved by the American Psychological Association. Also had a predoctoral internship in the Austin Child Guidance Center, working with children having a variety of emotional and

behavioral disorders. I have two postdoctoral diplomas, one in early child development from the University of Minnesota, covering intensively the first five years of development. I have another diploma, postdoctorally from the University of Oklahoma Medical School in child clinical and pediatric psychology.

I'm a member of American Psychological [sic] Association, full member of the Division of Clinical Psychology, full member of the Section on Child Clinical (p. 740) Psychology, full member of the Society of Pediatric Psychology of the American Psychological Association. I have published something beyond 40 research articles and books in the field of psychology, mainly having to do with the evaluation and treatment of children. Latest book is a case book in Child Clinical Pediatric Psychology published by Gilford Press in New York City where among other thing we deal with problems of assessments of treatment of children who have been sexually abused.

Q. What has your work experience been beyond the Northwest Passages Hospital right now?

A. I've been director of psychological services at Raleigh Hills Hospital for chemically dependent individuals, been director of treatment programs at the Intermountain Hospital Psychiatric Hospital.

Q. Did you have occasion with connection - in connection with this case to review the written psychological evaluation of one Jeannie Wright compiled by a Dr. Eisenbeiss?

A. Yes, I did.



Q. And that was at the instigation of my office to look that report over?

A. That's correct.

Q. With respect to the report as you viewed it on an intelligence test for Jeannie, what did you understand her (p. 741) intelligence to be in relation to her chronological age?

A. She's been administered the Peabody Picture Vocabulary Test, as I recall, and the findings indicated a mental age that was below her chronological age, several months below as I remember.

Q. All right. If I assert to you that it was four years one month when she was chronologically five years eight months, does that sound right?

A. Sounds right.

Q. What does that, and based on your experience, especially your intensive study of children one to five in their development, what does that indicate to you about any problem areas in terms of children relating factual events at that age?

A. Well, children who have a mental age of five years and chronological age of five years would have difficulty distinguishing fantasy from reality. The work of John Piaget, the great Swiss psychologist, indicates that children of five, on the average, are unable to distinguish things that they have thought about from things that they've actually encountered in a world of reality.

Children at the age of five years mentally have problems in retrieving memories, so memories that are once

stored have - are not consolidated, so to speak, are placed in abstract conceptual categories. The information may be (p. 742) there, it's just hard to retrieve it or bring it forth. And for these reasons children of this age level are very prone to respond to such things as leading questions. A question that implies information that was not actually the world of reality may become part of memory of a child, believes that that information fully occurred in the world of reality.

What I'm saying is that a child who was five years eight months chronologically, but has a mental age 15 months or so below that, will have even more severe problems in terms of retrieving memories and prone to be influenced by leading questions, will have problems distinguishing imagery, what they think about from the actual outside world.

Q. Do I understand you to be saying then, Dr. Thurber, that - correct me if I'm wrong, that were I to discuss with a child a particular action and event of that age that the child had not, in fact, experienced and discussed at some length, and asked the child to repeat it, that a child may have trouble distinguishing whether that actually happened to them or whether they've heard about it?

A. That's correct. It's especially the case in events that imply action. So if you describe for a four or five-year-old child some kind of an action-related behavior on the part of other people, the child has particular problems in distinguishing the discussion, the information (p. 743) presented verbally, from an actual experience and may confuse the two. And this comes from a lot of recent

research at New York University in regard to children and fantasy versus reality.

Q. Now, the child that confuses that, what they've heard with what actually has happened to them, and they recite what they've heard or report what they've heard, is that child lying in the normal sense that we understand it?

A. Absolutely not. Lying in the normal sense involves some kind of deception. To young children about the age of five on the average what is in their memory is true regardless of how that information got into the memory banks.

Q. If a child were to be reciting information that is true, even if it's not, in fact, happened something that they've heard and they've taken into their minds as being true, is that likely to affect how they react in the telling of it; their body positions, their outward acting, observations?

A. If a child is coming forth with what has been stored in memory, their nonverbal behaviors will be very consistent with that information. That is, they wouldn't be able to distinguish from what source the information was stored. So if we, for example, in research were to plant thoughts into the head of a young child and asked that child (p. 744) to rehearse what he has, or she has been told, the child will act as if this is true, both verbally and nonverbally.

Q. Let's go back to Dr. Eisenbeiss's evaluation. Did you have a chance to look over, and are you familiar with

the Children's Apperception Test and what's called the Plenk Story Telling test?

A. I'm familiar with the Children's Apperception. I've not heard of the Plenk test.

Q. Now, this Children's Apperception Test, could you describe for the jury just what that is and purports to test?

A. The test is composed of pictures of animals, some large, some small, several pictures of this type. And the child is asked to make up a story corresponding to the pictures. It's assumed that what is happening to the central figure in the child's story, the most prominent figure in the child's story, will be happening to the child himself or herself.

Q. And that is what they call a projective at the time by the child projecting its own feeling into the test?

A. That's correct.

Q. Assume if you would, please, the pattern of responses from that test, indicators if you will, these angry people being projected and some fear for physical safety. From that pattern alone is there any conclusion (p. 745) that can be drawn whether that child has been abused, or can accurately name its abuser?

A. First of all assuming that the interpretation is a reliable one, and the problem in the field of tests like the Childrens [sic] Apperception Test is that two clinical psychologists, or two psychiatrists who observe the same story will come up with different interpretations. But assuming that this is a reliable interpretation, no, that in



and of itself would not indicate a sexual abuse or physical abuse because there are so many possible other causes.

Q. Let's talk about the reliability of the Children's Apperception Test, the validity. Could you explain those two to the jury please?

A. Reliability has a number of meanings. With respect to the test such as the Children's Apperception Test, reliability refers to the degree of agreement among independent professionals. Typically you'll have ten or more clinical psychologists and psychiatrists who will read over the stories made in relation to the Children's Apperception stimuli and then each independently will interpret the stories, and then you assess the degree of agreement.

For example, how many of the ten agree that a certain story reflects aggression or hostility or sadness. And the findings indicate, at best, you can get something (p. 746) like a 60 percent agreement among judges. Another way of putting it is if you make decisions about people or about children based on the Children's Apperception Test, you'll make about 40 percent errors in your classifications, 40 percent errors.

Now, the validity refers to whether or not a test measured what it purports to measure. In other words, if the Children's Apperception Test does, in fact, measure a child's hostility this must be validated against known criteria. For example, does the child who gives you many aggressive stories, is that child also aggressive in the home and in the school? So you would validate the Children's Apperception Test against the behavioral ratings of aggression in the school. If the test measures what

it purports to measure you'd have a high relationship between real world aggression and aggression as found in the child's stories.

The validity of projected tests is notoriously low. Tests such as the Children's Apperception Test do not differentiate children of known behavioral disorders, that is to say you cannot give a group of children who have severe psychopathology, several disturbed children, from a group of normal children so-called on the basis of their Children's Apperception Test responses. So very low reliability, very low validities. In fact, according to the (p. 747) standards of American Psychological Association psychologists should not be making decisions about people based on tests such as the Children's Apperception Test with such low reliabilities and validities. The best you can get are some tentative hypotheses, nothing more.

Q. Now, you said you're unfamiliar with the Plenk Story Telling Test?

A. Yes, I am.

Q. If that test were widely used in your field of child psychology, clinical and child psychology, is it likely that you would be aware of it?

A. I would have to say yes. I have computer searches done monthly on tests that are available for clinical child psychologists. These are tests that have adequate levels of reliability and validity, and I do not recall having seen the Plenk Test show up on any of my computer searches.

The journals in my field, the scientific journals such as the Journal of Child Clinical Psychology have not



reported on this particular test. I'd have to say that it's not in the mainstream in child clinical psychology at this time.

Q. Okay. Let's talk a moment about gathering data from a child based on an interview with that child?

A. Yes.

(p. 748) Q. What are some of the pitfalls or dangers to be aware of to be sure that you're gathering accurate data from a child?

A. My first response is they are probably too numerous to mention. But, first and foremost, the examiner, the evaluator, the interrogator must be aware of personal biases and how those biases can be reflected in an interview situation. The primary consideration would be not to ask what are termed closed-ended questions, questions that can be asked - pardon me, questions that can be answered yes or no. It has been found that an interviewer's pre-existing assumptions and biases can be reflected in these questions and can guide children into the responses that the interviewer wants to see.

So we ask open-ended questions, questions that cannot be answered yes or no. It has also been found that interviewers can very subtly reward the responses they want to see, and can shape the answers of children. One of my colleagues in the Portland area, Bill McGeiver [sic] has found that simply by nodding the head and saying "um-hum" he can shape, so to speak, gradually shape behaviors in young children that border on the sexually bizarre, and these are children who have had no sexual

abuse in their background. Now these are also very young children, I might mention, from the four to six-year-old range.

(p. 749) So, an interviewer must be very, very aware that very subtle cues such as a nods [sic] or saying "um-hum" can reward young children, in effect, and can shape and determine the responses that the interviewer is going to see.

Attention, as such, is also a very important factor. If an interviewer has decided that a child has been sexually abused, for example, that interviewer will likely attend when the child responds in a way that is consistent with the assumptions, and will not attend if the child responds in a way that is contrary to the pre-existing assumption.

So, I think of the important issues here, the key ones are open ended questions, be aware of pre-existing biases, do not respond in subtle ways that might reward the responses that you want to see. We could go on and on. There are multitudinous problems in interviewing children.

One of my colleagues who - from whom I received training at the University of Oklahoma Medical School has recently published a book on the investigation and treatment of child abuse, and is probably the nation's authority at this time, C. Eugene Walker, and his position is that in initially approaching a child that presumably has been abused, that you use a very nonstructured kind of situation. You don't even ask questions. Bring the child (p. 750) in a room with many toys, many writing implements, papers. Let the child just behave spontaneously and see what comes of this kind of a situation without

attempting to prompt or influence the child by questions. And I would strongly support that approach because of the many possibilities of bias in terms of our questions.

Q. That sounds like a difficult task then to be certain not to inject anything into the interview.

A. Very much so.

Q. How can one guard – the best techniques for guarding against that so we can go back and determine whether an interviewer has skewed the information or injected their own feelings?

A. One consistent recommendation in the sexual abuse area is that on the initial interview by a professional, that the interview session itself be video taped. Thus other professionals independently can evaluate the quality of the interview techniques. That's the only way.

Q. Is an audio tape valuable?

A. In lieu of, or as a substitute for the video tape?

Q. Of course that won't reflect the nonvocal –

A. Correct. That would be the problem with it. So video tape is always recommended.

Q. All right. These interviewing techniques and (p. 751) skills. Are they likely to be learned in a weekend seminar fashion or –

A. Absolutely not. Any professional who works with children has to demonstrate actual supervised training, and this would be involved in a child clinical program or child psychiatry training program where you're

not only given formal classroom training but also supervised experiences by experts in the particular field. Now, these skills are not learned by workshops.

Q. Assume, if you would, please, a disclosure by a child of incestuous sexual abuse with emphasis on the fact that the perpetrator, or the assertion that the perpetrator is a father or stepfather and mother?

A. Yes.

Q. Assume initial disclosure to another parent involved in a custody battle as the initial disclosure?

A. Um-hum.

Q. Or at least initial discussions. Then please assume recitation of those discussions to doctors, and police personnel within a couple of days?

A. Yes.

Q. What is the likelihood in that scenario of non-leading or unbiased interviewing taking place?

A. I'd say a very low probability for an absence of bias. We're talking about individuals to begin with, a (p. 752) parent who would be unlikely to have training in this area, and that may have an ulterior motive, so to speak, for getting a particular response from the child. So I'd have to say a high probability of error.

Q. Assume then that same scenario, and that a therapist a Master's level therapist, I believe, interviewing. What should that therapist do in terms of their own knowledge about the facts of the case when they go into the interview with the child?



A. Well, preferably they would have no pre-existing knowledge, and that's the way of avoiding the bias. If the interviewer has pre-existing knowledge, then some of the issues of previously – I've discussed concerning the non-leading questions and the open-ended questions and preferably just a situation where you allow the child to behave spontaneously with the minimal of interaction with the interview – through the interviewer would be required here.

Q. What would the effect be of a child hearing a – an audio tape of its own recitation in terms of implanting that recitation in the child's memory?

A. Well, it's been found in work by Dent, 1983, that in interviewing children any kind of repetition, repeating the same question over and over again and listening to one's own answers via audio tape will, first of all, cause the (p. 753) child likely to say what you want to hear. It's another way of getting your biases reflected to a child's responses. So pushing the child with the same question over and over again will likely get the child to acquiesce, and acquiesce means to give you the response that would be consistent with your pre-existing biases. And certainly listening to an audio tape over and over again will thoroughly entrench the response. And, as I said earlier, with young children the likelihood is that that information heard and reheard on an audio player will become part of memory and will not be distinguishable in fact.

Q. The scenario that I've asked you to assume of initial discussion, or discussions, including a tape recording with a parent involved in a custody problem, subsequent disclosures to police and doctor personnel with

parents present, and then interviewing without the aid of video tape or audio tape and with the interviewer possibly, or probably having prior knowledge of the case. How would you evaluate the likelihood of any sort of reliable or accurate reporting in that scenario?

A. The likelihood would be exceedingly remote. Virtually all the errors that we've discussed would be in operation in such a scenario.

Q. Let's talk about interviewing in one other way. Assume, if you would, please, this scenario: Pediatrician (p.754) interviewing two-year-old child with the following questions "Do you play with daddy? Does daddy play with you? Do you ever touch daddy's pee-pee? Does daddy ever touch his pee-pee with you?"

How would you characterize that interview and those questions in terms of good procedure, responsible procedure that anyone should rely on?

A. All were closed-ended questions. And an inference I would make here is that the pediatrician would be in his or her office, probably wearing a white coat, which is more likely to evoke an acquiescence response; that is the child will answer in the way that the interviewer wants to hear.

Q. Now, getting away from interviewing a little bit and just credentials. Can a person with – an individual with a Master's in counseling and psychology from an education department and maybe a Ph.D. in counseling and psychology from an education department, can they ethically and legally call themselves a clinical psychologist?



MR. NAYLOR: Objection, foundation.

THE COURT: Sustain the objection until you establish further foundation.

Q. BY MR. HAYNES: Okay. Are you aware, sir, of what it takes to ethically call yourself a clinical psychologist?

(p. 755) A. Yes, I am.

Q. How are you aware of that?

A. I'm a member of the Division of Clinical Psychology of the American Psychological Association. I'm also aware of the guidelines for calling oneself a clinical psychologist as published in the American Psychologist, June of 1981.

Q. Are those the controlling guidelines for use of that term in a professional sense?

A. Yes, they are.

Q. Can one with the degrees that I mentioned ethically call oneself a clinical psychologist?

A. No, they cannot.

Q. Can one with the degrees that I mentioned ethically call oneself a child psychologist?

A. No, they cannot.

Q. When an interviewer or evaluator has their work independently tested or reviewed by an associate psychiatrist or psychologist is it likely that there's going to be some degree of difference between - over a long range of years? Does that question make any sense to you? It didn't to me. Let me try it again.

If an interviewer were to be engaged in a practice of interviewing children and gathering data from that, and conclusions from that over a significant number of (p. 756) years and frequently have that work checked by an associate psychologist, child psychologist or psychiatrist, is it likely for that person to be found never to be in error in their procedure and never to have a disagreement in conclusions?

A. I can't imagine that happening. I'd say you are more likely to get concordance or agreement with an individual with whom you're working, and when we have peer review we have other psychologists, clinical psychologists or psychiatrists who do not know the individual do the reviewing and evaluating. But, nonetheless, it's highly improbable that there would be no disagreement.

Q. Let's talk about a test from Dr. Eisenbeiss's report called the Parent Attachment Structured Interview. Are you aware of that particular test?

A. I wasn't familiar with it until I read it in the report.

Q. Again it is one of those that's likely to be - that you would likely be aware of if it was in the mainstream of use?

A. In my judgment, yes.

Q. From the report and the evaluation, did you glean or did you find out how that test was conducted and the results that it tested?

A. Well, I found out subsequently that it was a test (p. 757) where questions were asked and the child

responds by giving the name of an adult care giver. I didn't know about that prior to reading Dr. Eisenbeiss's report. And it seemed to me that the report placed a lot of weight, that is, Dr. Eisenbeiss's report placed a lot of weight on the result of that particular inventory.

Q. Okay. What effect would it have on the child in terms of who they're living with, with respect to how that child is going to report and answer those questions, in your opinion?

A. Well, the names of the care givers with whom the child lives are going to be in the forefront of memory and recall, and it would likely be evoked first, in my estimation.

Q. Okay. The failure of a child to name care givers both either positive or negative with whom the child is not living, does that seem indicative to you of a lack of bonding between that child and the noncustodial care givers?

A. I think the best interpretation would be the remoteness in the child's memory.

Q. Okay. Does the procedure, as you read it, and the results that you read make you feel confident in terms of a professional being able to give an opinion as to whether there is positive or negative bonding between a child and individuals?

(p. 758) A. It makes me feel very uncomfortable. I searched in vain for any reliability or validity information on this particular test. It could be that these - that this particular approach to assessment of attachment is completely unreliable. That happens in the field and without

any kind of research data we just don't know. This test could yield completely erroneous classifications absolutely error-filled, for all we know.

Q. Am I understanding you in saying then you're not asserting that the test itself is bunk, just that we don't know whether it's any good or not?

A. That's exactly right.

Q. All right. Can you rely on reliability and validity figures provided by the persons who manufacture and sell the test?

A. You can if they meet the standards of the American Psychological Association. These are very rigorous standards. But even so any kind of measuring instrument has to be kept under scrutiny because a test that might be reliable and valid at a given time period may lose reliability in time as society changes. So reliability and validities are changing phenomena and we have to keep scrutinizing them.

MR. HAYNES: Thank you. I have no other questions.

(p. 759) CROSS-EXAMINATION

BY MR. NAYLOR:

Q. Dr. Thurber, does your psychological license from the State of Idaho say "clinical psychologist" on it?

A. No. It's a generic license.

Q. Does it say "child psychologist" on it?

A. No, it does not.

Q. Does any of your degrees – strike that. I believe you've made that clear.

And it's true that Defense Counsel has hired you to come here to testify, is that true?

A. I'm not sure hire is the correct word.

Q. They obtained your services for which you intend to receive a fee?

A. To be honest, I don't know if I'm going to receive a fee.

Q. Okay.

A. Most often, by the way, I do not request a fee in these cases, sexual abuse, to avoid bias.

Q. That would be a good practice. And isn't it true that you spoke with Defense Counsel, what, just a week or two ago with your findings after reviewing Dr. Eisenbeiss's report?

A. About a week ago, yes. Less than a week.

Q. And isn't it true that you do not know, nor have (p. 760) you ever met Jeannie Wright?

A. That's correct.

Q. And you do not know or have never met Kathy Wright?

A. Correct.

Q. However, you do know that this case involved those two children, correct?

A. Yes, I do.

Q. And you've never given Jeannie any psychological evaluations of your own?

A. No, I have not.

Q. Nor Kathy?

A. No.

Q. Now, you indicated in the hypothetical scenario by Defense Counsel where the child relates to a parent, or person involved in a custody battle, there might be some personal bias in the first disclosure of sexual abuse?

A. Yes.

Q. Now, isn't it true that that same type of bias would not be present with other medical personnel, doctor, for example, who is not attempting to diagnose physical ailments?

A. I can't answer that.

Q. Nor with police officers who are involved in obtaining facts? Do you have any data to determine whether (p. 761) there would be personal bias there?

A. My reaction there is, if you don't mind just a very brief elaboration, that in the writings on sexual abuse found in some of the journals in the '70's and '80's are statements such as, "Children do not lie when they state they have been abused in any way." That has been discounted by subsequent research. But most – in my opinion most individuals who are on the front line professionally in interrogating children assume that if the child has made a revelation to a parent about sexual abuse, there can be no lie in the sexual abuse and that sex



abuse has taken place. So in that sense I think there might be a preexisting bias.

Q. Now, let's take that one step further, and let's say the issue here isn't that whether the child was actually abused and she's lying about that. Let's say that that is substantiated and that actually did occur?

A. Yes.

Q. Then is there any way to separate that first disclosure, where she said she had been sexually abused, with other details of it at disclosure and abuse of who did it, and what actually occurred? Is there any way to tell which are lies and which are truths?

A. Well, there are some ways, yes.

Q. And that would take some psychological valuation and testing?

(p. 762) A. Absolutely.

Q. All of which you had not done in this case?

A. Correct.

Q. And while we're talking about hypotheticals let's complete this one. Given the pediatrician again who is talking to a two-year-old, given the following questions: "Do you play with daddy? Does daddy play with you? Does daddy touch you with his pee-pee? Do you touch his pee-pee?" Now, at that point in time you indicated, from your prior testimony, that those are closed-ended questions?

A. Correct.

Q. All right. Now, if that child then in response to "How does your father touch you with his pee-pee?" Is that a closed ended question?

A. No. That would be an open-ended question.

Q. That would be open, and at that point in time this two-year-old reflects, then responds voluntarily, "Daddy did this a lot more to my sister than he did to me." Would you find some kind of frequency, bias or leading type response at that point?

A. Two responses here. One is that I'd place credence on the child's elaboration if the child goes beyond the question itself and elaborates in some detail. But also have to say that an open-ended question that comes after a closed-ended question can still have bias. The closed-ended (p. 763) question will plant the thought, will plant the image and fantasy.

Q. Thank you. And do you believe that psychology is still in its developmental stages?

A. Excuse me for trying to define developmental because that has a particular meaning to me. I'd say psychology is in much the same position that established sciences such as physics and chemistry were in about 100 years ago. I'd also say that in the field of sexual abuse it's only been the last two years that we've had anything in the way of data base. So, as far as that area is concerned, yes, in the extreme immature developmental stage.

Q. And do you believe that psychology is an exact science?

A. I'll have - if you don't mind "exact" what does that mean?

Q. A hard science, physics, math with absolutes?

A. I'd have to respond to that by saying that according to the National Science Foundation, psychology has the most rigorous methodologies as any science. In that sense I'd classify it as a very hard science, it has to be that way because our subject matter is so complicated.

MR. NAYLOR: Thank you, doctor.

MR. HAYNES: Nothing on redirect.

THE COURT: You may step down.

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No. 89-260

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In The  
Supreme Court of the United States  
October Term, 1989

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THE STATE OF IDAHO,

*Petitioner,*

vs.

LAURA LEE WRIGHT,

*Respondent.*

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On Writ Of Certiorari  
To The Supreme Court Of Idaho

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BRIEF FOR PETITIONER

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**QUESTION PRESENTED**

Whether the "particularized guarantees of trustworthiness" mandated by the Sixth Amendment Confrontation Clause of the United States Constitution require that the hearsay statement of a very young victim of sexual abuse to an examining pediatrician be excluded unless the prosecution establishes that (a) the interview was either audio or videotaped; (b) leading questions were not used; and (3) the examining pediatrician conducting the interview did not have any preconceived idea of what the child should be disclosing.

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## OPINION BELOW

The opinion of the Idaho Supreme Court is reported as *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989).

The opinion of the Idaho Supreme Court in the companion case is reported as *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989).

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 JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The judgment below is not based on an independent and adequate state ground. The Idaho Supreme Court relied entirely upon the Confrontation Clause of the Sixth Amendment to the United States Constitution in excluding the out-of-court statements of the child sexual abuse victim who was unavailable to testify at trial. Idaho does not have a state constitutional confrontation clause.

---

 CONSTITUTIONAL AND STATUTORY PROVISIONS  
AND RULES OF EVIDENCE INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . .

Idaho Code § 19-3024 provides:

19-3024. Statements by child. - Statements made by a child under the age of ten (10) years describing any act of sexual abuse, physical

abuse or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

1. The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and

2. The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness. A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Provided that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.

Statements may not be admitted unless the proponent of the statements notifies the adverse party of his intention to offer the statements and the particulars of the statements sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements.

Rule 803, Idaho Rules of Evidence, provides:

**Rule 803. Hearsay exceptions; availability of declarant immaterial.** – The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

.....

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

---

#### STATEMENT OF THE CASE

Laura Lee Wright was convicted of two counts of lewd conduct with a minor. The victim of Count II, referred to throughout this brief as the younger daughter, was the two-and-one-half-year-old daughter of Wright and her codefendant Robert L. Giles. The victim of Count I, referred to throughout this brief as the older daughter, was the five-and-one-half-year-old daughter of Wright and her husband Louis Wright, from whom she was separated at all times relevant to this case. At the time the sexual abuse was reported the older daughter was living with her father, Louis Wright, and his girlfriend, pursuant to an informal joint custody agreement. Tr. p.490. In early October 1986, Louis went to the home of Laura Lee



Wright and Robert Giles to take custody of the older daughter. When Laura refused to give him physical custody of the older daughter, Louis took her for ice cream and did not return her to Laura.

On Saturday afternoon, November 8, 1986, the older daughter took her bath with the help of her father's girlfriend, Cynthia Goodman. Tr. p.489. They spoke of a number of things, including the older daughter's difficulties with bed wetting. Cynthia testified:

[S]he said that "When mommy and daddy Bobby are done" and just her little eyes flew open, and she just stopped just real sudden. Just didn't - kind of like she had been electrocuted. She had just stopped, and from looking at her, you know, at her face I asked her what was wrong, you know, she could tell me, and she could trust me, you know. And she just stood there for a little bit and then she just started crying and told me what Bobby [Giles] had done and what Laura [Wright] had done.

. . . .

. . . She said they were games, they were - Bobby had named games called life and sex and at that time I didn't understand what she was saying. I says, "Well, you're going to have to tell me, I don't understand what you're saying," and she said that Bobby would get on top of her and - how did she put it? He would move and move and move and it would hurt. And I asked her again. I said, "What do you mean, Jeannie," and she said that Bobby would put his dick in her pussy, as she put it.

Tr. p.456, L.19 - p.457, L.14.

The following day, Goodman and Louis Wright reported the sexual abuse to the police and took the older

daughter to the hospital. Tr. pp.461-462. The initial examination was done by Dr. Johnson, a doctor with no experience in child sexual abuse detection. He called in Dr. Bayer, his faculty backup, and Dr. Jambura, a pediatrician with extensive experience in handling child abuse cases. Tr. pp.508-509. This examination revealed that the older daughter's upper leg had a fairly large bruise, the labia minora were slightly fused inferiorly, a slight abrasion existed next to the labia minora on the right inferior region, and the hymenal ring was absent and rather than being fairly rough and unmarked was completely smooth. Dr. Bayer testified that this was a sign of chronic abuse. Tr. pp.352-353. Dr. Jambura testified that it was "highly possible that vaginal penetration had been occurring on a relatively regular basis." J.A.100.

After the medical examination, the older daughter, her father Louis Wright, and his girlfriend Cynthia Goodman met with Larry Armstrong, a Boise City police detective who holds a counseling license and a master's degree in education. The older daughter told Detective Armstrong that her little sister had also been hurt by Mom [Laura Wright] and Bobby [Giles] and they would do the same things to her little sister that they did to her. Tr. p.33. Detective Armstrong then went to the home of Laura Wright and Robert Giles and took the two-and-one-half-year-old biological daughter of Laura Wright and Robert Giles into protective custody. Tr. pp.337-338.

The following day, November 10, 1986, the younger daughter was taken to Dr. Jambura for a physical examination. This examination revealed some redness and bruises in the early stage of healing on the inner surface

of the labia majora and the labia minora, and some scarring in the back portion of the vagina. J.A.105. Dr. Jambura explained that it is very difficult to bruise the labia minora, and the bruising on the inner surfaces of both labia suggested that forceful contact had been with the inner genital area. J.A.105-106. Dr. Jambura believed that the trauma occurred approximately two to three days prior to his examination of the younger daughter, but because of the acute injuries he could not ascertain whether chronic abuse had been occurring. J.A.106-107.

After doing a complete physical examination on the younger daughter, Dr. Jambura visited with her. He began with a few minutes of "chitchat" and she started to carry on a very relaxed, animated conversation. Dr. Jambura moved gently into the domestic situation with questions such as how things are at home and then asked four specific questions. When Dr. Jambura asked her, "Do you play with daddy?" she made a comment about yes we play a lot, expanded on that, and talked about spending time with daddy. In response to Dr. Jambura's question, "Does daddy play with you?" she responded that they played together in a variety of circumstances, and she seemed very unaffected by the question. Dr. Jambura then asked her, "Does daddy touch you with his pee-pee?" To aid in answering his question Dr. Jambura drew a picture, to which she added a penis. J.A.117. She then answered the question in the affirmative. When Dr. Jambura asked her, "Do you touch his pee-pee?" she was silent. After allowing some silence, she told Dr. Jambura that "Daddy does do this with me, but he does it a lot more with my sister than with me." J.A.121-123.

Laura Lee Wright and Robert Giles were each charged with the sexual abuse of both young girls. Prior to trial the state filed a motion in limine for rulings on the admissibility of a number of hearsay statements made by both girls. The state based its motion on Idaho Code §19-3024, the Idaho statutory hearsay exception for victims of sexual abuse, physical abuse or other criminal conduct committed upon a child witness. J.A.4-8. The court reserved its ruling until trial. At the hearing on the state's motion, the court made it clear that Idaho Rule of Evidence 803(24)<sup>1</sup> would be considered in addition to Idaho Code § 19-3024 as to the admissibility of the hearsay statements of both young girls. The prosecutor argued that the younger daughter's statements to Dr. Jambura were also admissible pursuant to Rules 803(4) and (24). J.A.21. The court reserved its ruling on the admissibility of the numerous hearsay statements until each was ready to be presented by the state. J.A.30.

Before the state presented its first witness, a hearing was held to determine whether the younger daughter, who had turned three just one month prior to the trial, Tr. p.550, Ls.20-23, and the older daughter, who had turned six just one month prior to the trial, Tr. p.197, Ls.7-15, were capable of testifying. J.A.32-40. After the judge questioned the younger daughter, he determined that she was "not capable of communicating to the jury." Both the prosecutor and defense counsel agreed. J.A.38-39. After questioning the older daughter, the court held that

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she was "able to perceive, recollect and relate truthfully perceptions; that it is up to the jury to weigh the evidence, and she may testify." Tr. p.204, Ls.8-11.

Although the older daughter had difficulty testifying, she was able to testify about the sexual abuse of her younger sister committed by Robert Giles and Laura Wright. J.A.48-55; 61-62; 67; 78-79.

Q. And do you remember telling – well, do you remember what you saw the private touching with Bobby and Laura and [your younger sister], what would Laura be doing?

A. She would be holding [my younger sister's] leg and holding her mouth so she wouldn't scream.

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Prior to Dr. Jambura's testifying as to the younger daughter's statements to him, a hearing was held outside the presence of the jury. Counsel for Wright and Giles asserted that, because the younger daughter was not capable of testifying, her statements to the doctor should not be admitted and that admission of the statements would violate his clients' constitutional right to confront witnesses. The prosecutor argued that the statements of the younger daughter to Dr. Jambura were admissible under Rule 803(4), the medical exception. He had previously argued the admissibility under Idaho Code § 19-3024. The district judge explained that his finding that the younger daughter was not capable of communicating to the jury did not prevent the admission of her out-of-court statements "if they meet the reliability test." J.A.115. The judge explained that (1) there was physical

evidence to corroborate that sexual abuse occurred; (2) the statements of the younger daughter to Dr. Jambura were not the type of statements that such a young child would make up; and (3) the younger daughter's identification of her daddy as the person who sexually abused her was reliable because (a) the injuries occurred at the time she was in the custody of her mother and father, the two defendants, and (b) her older sister in her testimony had previously identified Laura Wright and Bobby Giles as the perpetrators of the sexual abuse. J.A.115. The trial court permitted Dr. Jambura to testify as to the statements the younger daughter made to him during his examination of her, pursuant to Rule 803(24). J.A.119.

Police officer Larry Armstrong, Tr. p.333, Ls.15-24; examining physician Dr. Johnson, Tr. p.511, Ls.21-25; psychologist Dr. Eisenbeis, Tr. p.419, Ls.1-8; and Cynthia Goodman, Tr. p.406, Ls.14-20, each testified that the older daughter had told him or her of the sexual acts Wright and Giles did with her and that she had seen them do the same thing with her little sister. A defense witness testified that the older daughter had falsely accused him of sexually abusing her. Tr. pp.638-640. The defendant, Laura Lee Wright, testified that the older daughter had told her of sexual molestation incidents at the hands of Cynthia Goodman's boys. Tr. p.525, L.21 – p.526, L.3.

Both Laura Lee Wright and Robert Giles were convicted of sexually abusing both young girls. Each appealed from the conviction for sexually abusing the younger daughter, but neither appealed from the conviction for sexually abusing the older daughter. Counsel for Wright claimed only that the admission of Dr. Jambura's testimony as to the younger daughter's statements made



during his examination of her violated Wright's Sixth Amendment right to confront witnesses against her. Counsel for Giles did not raise this constitutional claim; rather he based his appeal entirely on the Idaho Rules of Evidence, asserting they were violated by the admission of Dr. Jambura's testimony concerning those same statements of the younger daughter.

The Idaho Supreme Court first decided Giles' appeal, holding that Dr. Jambura's testimony was properly admitted under Rule 803(24). The court held that the statements of the younger daughter to Dr. Jambura had sufficient indicia of reliability and circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions. *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989), appendix to the petition, A.23. Subsequently, a three member majority of the Idaho Supreme Court held that, although Dr. Jambura's testimony was properly admitted under Rule 803(24), its admission was "in violation of the standards applicable to the Confrontation Clause of the United States Constitution." *State v. Wright*, 116 Idaho 382, 383, 775 P.2d 1225, 1226 (1989), appendix to the petition, A.1. The court explained that the younger daughter's statements to Dr. Jambura lacked the particularized guarantees of trustworthiness necessary to satisfy the Confrontation Clause because (1) the interview was not videotaped, (2) Dr. Jambura asked leading questions, and (3) he had a preconceived idea of what the younger daughter would be disclosing.

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## SUMMARY OF ARGUMENT

This Court has never interpreted the literal wording of the Confrontation Clause so as to exclude reliable out-of-court statements of unavailable declarants. On the contrary, this Court recognizes that the truth-seeking function of the Sixth Amendment is furthered when reliable out-of-court statements of unavailable witnesses are admitted into evidence.

Hearsay statements are admitted as exceptions to the face-to-face requirement of the Confrontation Clause when public policy or the necessities of the case so require. Public policy and "the rule of necessity" demand that reliable out-of-court statements of child sex abuse victims who are unavailable at trial be admitted into evidence.

This Court should rule that a totality of the circumstances test – similar to that used for purposes of the residual hearsay exception of Rule 803(24) and of many recently enacted statutes and rules providing a child sexual abuse victim hearsay exceptions – should be used to determine "indicia of reliability" under the Confrontation Clause.

The Idaho Supreme Court erred in creating three inflexible conditions precedent for admission of child sexual abuse victims' hearsay statements.

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## ARGUMENT

### I.

#### THE CONFRONTATION CLAUSE HAS NEVER BEEN INTERPRETED TO EXCLUDE THE ADMISSION OF RELIABLE OUT-OF-COURT STATEMENTS OF UNAVAILABLE WITNESSES

The Idaho Supreme Court overturned the conviction of Laura Lee Wright for sexual abuse of her two-and-one-half-year-old daughter because the hearsay statements of the youngster to her pediatrician were not videotaped and because they were elicited by leading questions from an interviewer who had a preconceived idea of the likely answers. The Idaho court purported to ground its decision on this Court's recent cases dealing with the Confrontation Clause.

The purpose of confrontation between an accuser and defendant is that it "undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and is present at trial." *Ohio v. Roberts*, 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2538, n. 6, 65 L.Ed.2d 597 (1980). Only last year, the United States Supreme Court found that the sexual assault defendant's right to face-to-face confrontation was violated by permitting two 13-year-old girls to testify behind a large screen that enabled Coy to dimly perceive the witnesses but rendered them unable to see him. *Coy v. Iowa*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

*State v. Wright*, 116 Idaho at 384, 775 P.2d at 1226. Neither a literal nor a functional reading of the Confrontation Clause offers any support for the Idaho court's ruling

that out-of-court statements of an unavailable child sexual abuse victim – which statements are found to be reliable under the residual hearsay exception, Rule 803(24) – are inadmissible unless they meet three novel litmus tests of the Idaho court's own devising.

#### A. The Literal Wording of the Confrontation Clause Does Not Exclude Reliable Hearsay of Unavailable Witnesses

In *Coy v. Iowa*, 108 S.Ct. 2798 (1988), this Court recently reaffirmed the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." *Id.* at 2801 (quoting *California v. Green*, 399 U.S. 149, 157 (1970)). The Court was unsympathetic to the state's argument that "the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse." *Id.* at 2802. Indeed, for the *Coy* majority, the fact that face-to-face confrontation with the defendant may inflict trauma on the abused child simply illustrates the "truism that constitutional protections have costs." *Id.*

Thus, there is language in *Coy* that may have led the Idaho court to conclude that when the rights of a child victim of sexual abuse conflict with those of a criminal defendant, the Confrontation Clause of the Sixth Amendment to the United States Constitution gives the nod to the latter. But it is a quantum leap from *Coy*'s reaffirmation of "the irreducible literal meaning of the clause: 'a right to meet face to face all those who appear and give evidence at trial,' " *Id.* at 2803 (quoting Harlan, J., concurrence in *California v. Green*, 399 U.S. at 175) (emphasis

held that the dying declaration of a murder victim was properly admitted "upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose." *Id.* at 152. Thus, the out-of-court statement of the dying victim was admitted at trial because it met the dual tests of necessity and reliability.

Upon appeal from Mattox's retrial, the Court recognized yet another hearsay exception and upheld the admissibility of testimony of two witnesses from the first trial who had died prior to Mattox's second trial.

But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to *considerations of public policy and the necessities of the case*. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

156 U.S. at 243 (emphasis added).

All three opinions of this Court in *Coy v. Iowa* reaffirm the principle that reliable hearsay of an unavailable declarant is admissible when required by "considerations of public policy and the necessities of the case."

The majority opinion in *Coy* noted that prior Court opinions had held – with regard to "the right to exclude

out-of-court statements" – that the "rights conferred by the Confrontation Clause are not absolute and may give way to other important interests." 108 S.Ct. at 2802. This is particularly true with regard to "the right to exclude out-of-court statements." *Id.* (referring to *Ohio v. Roberts*, 448 U.S. 56 (1980)). Similarly, the majority, in a lengthy discussion of Wigmore's views on the Confrontation Clause, referred approvingly to the "sensible and traditional exceptions to the hearsay rule . . . ." *Id.* at 2801-02, n. 2. Finally, though the majority would approve of additional exceptions to the face-to-face requirement of the Confrontation Clause sparingly, it conceded that such exceptions were possible "when necessary to further an important public policy." *Id.* at 2803.

Justice O'Connor's concurrence rejected outright any suggestion that a defendant has an absolute " 'right physically to face those who testify against him,' *ibid.*, even if located at the 'core' of the Confrontation Clause . . . ." *Id.* at 2804 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). Instead, the Confrontation Clause only " 'reflects a preference for face-to-face confrontation at trial,' " which preference "may be overcome in a particular case if close examination of 'competing interests' so warrants." *Id.* (quoting *Ohio v. Roberts*, 448 U.S. at 63-64) (emphasis in original). In particular, the concurring opinion noted that:

[v]irtually all of our cases approving the use of hearsay evidence have implicated the literal right to "confront" that has always been recognized as forming "the core of the values furthered by the Confrontation Clause," *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-1935, 26 L.Ed.2d 489 (1970), and yet have



abuse or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

1. The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and

2. The child either:

- (a) Testifies at the proceedings; or

- (b) Is unavailable as a witness. A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Provided that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.

Statements may not be admitted unless the proponent of the statements notifies the adverse party of his intention to offer the statements and the particulars of the statements sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements.

Rule 803, Idaho Rules of Evidence, provides:

**Rule 803. Hearsay exceptions; availability of declarant immaterial.** – The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

• • • • •

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

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### STATEMENT OF THE CASE

Laura Lee Wright was convicted of two counts of lewd conduct with a minor. The victim of Count II, referred to throughout this brief as the younger daughter, was the two-and-one-half-year-old daughter of Wright and her codefendant Robert L. Giles. The victim of Count I, referred to throughout this brief as the older daughter, was the five-and-one-half-year-old daughter of Wright and her husband Louis Wright, from whom she was separated at all times relevant to this case. At the time the sexual abuse was reported the older daughter was living with her father, Louis Wright, and his girlfriend, pursuant to an informal joint custody agreement. Tr. p.490. In early October 1986, Louis went to the home of Laura Lee

Wright and Robert Giles to take custody of the older daughter. When Laura refused to give him physical custody of the older daughter, Louis took her for ice cream and did not return her to Laura.

On Saturday afternoon, November 8, 1986, the older daughter took her bath with the help of her father's girlfriend, Cynthia Goodman. Tr. p.489. They spoke of a number of things, including the older daughter's difficulties with bed wetting. Cynthia testified:

[S]he said that "When mommy and daddy Bobby are done" and just her little eyes flew open, and she just stopped just real sudden. Just didn't - kind of like she had been electrocuted. She had just stopped, and from looking at her, you know, at her face I asked her what was wrong, you know, she could tell me, and she could trust me, you know. And she just stood there for a little bit and then she just started crying and told me what Bobby [Giles] had done and what Laura [Wright] had done.

. . . .

. . . She said they were games, they were - Bobby had named games called life and sex and at that time I didn't understand what she was saying. I says, "Well, you're going to have to tell me, I don't understand what you're saying," and she said that Bobby would get on top of her and - how did she put it? He would move and move and move and it would hurt. And I asked her again. I said, "What do you mean, Jeannie," and she said that Bobby would put his dick in her pussy, as she put it.

Tr. p.456, L.19 - p.457, L.14.

The following day, Goodman and Louis Wright reported the sexual abuse to the police and took the older

daughter to the hospital. Tr. pp.461-462. The initial examination was done by Dr. Johnson, a doctor with no experience in child sexual abuse detection. He called in Dr. Bayer, his faculty backup, and Dr. Jambura, a pediatrician with extensive experience in handling child abuse cases. Tr. pp.508-509. This examination revealed that the older daughter's upper leg had a fairly large bruise, the labia minora were slightly fused inferiorly, a slight abrasion existed next to the labia minora on the right inferior region, and the hymenal ring was absent and rather than being fairly rough and unmarked was completely smooth. Dr. Bayer testified that this was a sign of chronic abuse. Tr. pp.352-353. Dr. Jambura testified that it was "highly possible that vaginal penetration had been occurring on a relatively regular basis." J.A.100.

After the medical examination, the older daughter, her father Louis Wright, and his girlfriend Cynthia Goodman met with Larry Armstrong, a Boise City police detective who holds a counseling license and a master's degree in education. The older daughter told Detective Armstrong that her little sister had also been hurt by Mom [Laura Wright] and Bobby [Giles] and they would do the same things to her little sister that they did to her. Tr. p.33. Detective Armstrong then went to the home of Laura Wright and Robert Giles and took the two-and-one-half-year-old biological daughter of Laura Wright and Robert Giles into protective custody. Tr. pp.337-338.

The following day, November 10, 1986, the younger daughter was taken to Dr. Jambura for a physical examination. This examination revealed some redness and bruises in the early stage of healing on the inner surface

of the labia majora and the labia minora, and some scarring in the back portion of the vagina. J.A.105. Dr. Jambura explained that it is very difficult to bruise the labia minora, and the bruising on the inner surfaces of both labia suggested that forceful contact had been with the inner genital area. J.A.105-106. Dr. Jambura believed that the trauma occurred approximately two to three days prior to his examination of the younger daughter, but because of the acute injuries he could not ascertain whether chronic abuse had been occurring. J.A.106-107.

After doing a complete physical examination on the younger daughter, Dr. Jambura visited with her. He began with a few minutes of "chitchat" and she started to carry on a very relaxed, animated conversation. Dr. Jambura moved gently into the domestic situation with questions such as how things are at home and then asked four specific questions. When Dr. Jambura asked her, "Do you play with daddy?" she made a comment about yes we play a lot, expanded on that, and talked about spending time with daddy. In response to Dr. Jambura's question, "Does daddy play with you?" she responded that they played together in a variety of circumstances, and she seemed very unaffected by the question. Dr. Jambura then asked her, "Does daddy touch you with his pee-pee?" To aid in answering his question Dr. Jambura drew a picture, to which she added a penis. J.A.117. She then answered the question in the affirmative. When Dr. Jambura asked her, "Do you touch his pee-pee?" she was silent. After allowing some silence, she told Dr. Jambura that "Daddy does do this with me, but he does it a lot more with my sister than with me." J.A.121-123.

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Police officer Larry Armstrong, Tr. p.333, Ls.15-24; examining physician Dr. Johnson, Tr. p.511, Ls.21-25; psychologist Dr. Eisenbeis, Tr. p.419, Ls.1-8; and Cynthia Goodman, Tr. p.406, Ls.14-20, each testified that the older daughter had told him or her of the sexual acts Wright and Giles did with her and that she had seen them do the same thing with her little sister. A defense witness testified that the older daughter had falsely accused him of sexually abusing her. Tr. pp.638-640. The defendant, Laura Lee Wright, testified that the older daughter had told her of sexual molestation incidents at the hands of Cynthia Goodman's boys. Tr. p.525, L.21 – p.526, L.3.

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during his examination of her violated Wright's Sixth Amendment right to confront witnesses against her. Counsel for Giles did not raise this constitutional claim; rather he based his appeal entirely on the Idaho Rules of Evidence, asserting they were violated by the admission of Dr. Jambura's testimony concerning those same statements of the younger daughter.

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The Idaho Supreme Court erred in creating three inflexible conditions precedent for admission of child sexual abuse victims' hearsay statements.

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## ARGUMENT

### I.

#### THE CONFRONTATION CLAUSE HAS NEVER BEEN INTERPRETED TO EXCLUDE THE ADMISSION OF RELIABLE OUT-OF-COURT STATEMENTS OF UNAVAILABLE WITNESSES

The Idaho Supreme Court overturned the conviction of Laura Lee Wright for sexual abuse of her two-and-one-half-year-old daughter because the hearsay statements of the youngster to her pediatrician were not videotaped and because they were elicited by leading questions from an interviewer who had a preconceived idea of the likely answers. The Idaho court purported to ground its decision on this Court's recent cases dealing with the Confrontation Clause.

The purpose of confrontation between an accuser and defendant is that it "undoubtedly makes it more difficult to lie against someone, particularly if that person is an accused and is present at trial." *Ohio v. Roberts*, 448 U.S. 56, 63, n. 6, 100 S.Ct. 2531, 2538, n. 6, 65 L.Ed.2d 597 (1980). Only last year, the United States Supreme Court found that the sexual assault defendant's right to face-to-face confrontation was violated by permitting two 13-year-old girls to testify behind a large screen that enabled Coy to dimly perceive the witnesses but rendered them unable to see him. *Coy v. Iowa*, \_\_\_ U.S. \_\_\_, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).

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that out-of-court statements of an unavailable child sexual abuse victim – which statements are found to be reliable under the residual hearsay exception, Rule 803(24) – are inadmissible unless they meet three novel litmus tests of the Idaho court's own devising.

#### A. The Literal Wording of the Confrontation Clause Does Not Exclude Reliable Hearsay of Unavailable Witnesses

In *Coy v. Iowa*, 108 S.Ct. 2798 (1988), this Court recently reaffirmed the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause." *Id.* at 2801 (quoting *California v. Green*, 399 U.S. 149, 157 (1970)). The Court was unsympathetic to the state's argument that "the confrontation interest at stake here was outweighed by the necessity of protecting victims of sexual abuse." *Id.* at 2802. Indeed, for the *Coy* majority, the fact that face-to-face confrontation with the defendant may inflict trauma on the abused child simply illustrates the "truism that constitutional protections have costs." *Id.*

Thus, there is language in *Coy* that may have led the Idaho court to conclude that when the rights of a child victim of sexual abuse conflict with those of a criminal defendant, the Confrontation Clause of the Sixth Amendment to the United States Constitution gives the nod to the latter. But it is a quantum leap from *Coy*'s reaffirmation of "the irreducible literal meaning of the clause: 'a right to *meet face to face* all those who appear and give evidence *at trial*,'" *Id.* at 2803 (quoting Harlan, J., concurrence in *California v. Green*, 399 U.S. at 175) (emphasis



added by *Coy* Court), to a ban on the admission of reliable out-of-court statements of those who are unavailable and thus unable to appear and give evidence at trial.

The Idaho court may also have based its ban on the admissibility of the unavailable witness's reliable hearsay statements on the literal language of the Sixth Amendment's Confrontation Clause itself, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . ." The potentially misleading nature of this language was noted by Justice Harlan: "Since, however, an extrajudicial declarant is no less a 'witness,' the clause is equally susceptible of being interpreted as a blanket prohibition on the use of any hearsay testimony." *California v. Green*, 399 U.S. at 175. But the literal wording of the Confrontation Clause has never been interpreted by this Court to ban reliable hearsay testimony of persons unavailable at trial. This question was squarely faced in *Mattox v. United States*, 156 U.S. 237 (1895). There the Court acknowledged that admission of dying declarations clearly violated the literal wording of the Sixth Amendment:

[T]here could be nothing more directly contrary to the letter of the provision in question [the Confrontation Clause] than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury. . . .

*Id.* at 243 (bracketed material added).

Despite the literal violation, the admissibility of such statements had already been a long-recognized exception to the Confrontation Clause nearly a century ago:

yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice.

*Id.*<sup>2</sup> Indeed, as the *Mattox* court noted, such exceptions predate the Constitution itself and are woven into its fabric:

Many of its [the Constitution's] provisions in the nature of a Bill of Rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant.

*Id.* at 243 (bracketed material added).

In *Mattox v. United States*, 146 U.S. 140 (1892), an earlier appeal of the *Mattox* case noted above, this Court

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<sup>2</sup> Similarly, this Court has held: "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common-law right having recognized exceptions. The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions." *Salinger v. United States*, 272 U.S. 541, 548 (1926).

held that the dying declaration of a murder victim was properly admitted "upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose." *Id.* at 152. Thus, the out-of-court statement of the dying victim was admitted at trial because it met the dual tests of necessity and reliability.

Upon appeal from Mattox's retrial, the Court recognized yet another hearsay exception and upheld the admissibility of testimony of two witnesses from the first trial who had died prior to Mattox's second trial.

But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to *considerations of public policy and the necessities of the case*. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

156 U.S. at 243 (emphasis added).

All three opinions of this Court in *Coy v. Iowa* reaffirm the principle that reliable hearsay of an unavailable declarant is admissible when required by "considerations of public policy and the necessities of the case."

The majority opinion in *Coy* noted that prior Court opinions had held – with regard to "the right to exclude

out-of-court statements" – that the "rights conferred by the Confrontation Clause are not absolute and may give way to other important interests." 108 S.Ct. at 2802. This is particularly true with regard to "the right to exclude out-of-court statements." *Id.* (referring to *Ohio v. Roberts*, 448 U.S. 56 (1980)). Similarly, the majority, in a lengthy discussion of Wigmore's views on the Confrontation Clause, referred approvingly to the "sensible and traditional exceptions to the hearsay rule . . . ." *Id.* at 2801-02, n. 2. Finally, though the majority would approve of additional exceptions to the face-to-face requirement of the Confrontation Clause sparingly, it conceded that such exceptions were possible "when necessary to further an important public policy." *Id.* at 2803.

Justice O'Connor's concurrence rejected outright any suggestion that a defendant has an absolute " 'right physically to face those who testify against him,' *ibid.*, even if located at the 'core' of the Confrontation Clause . . . ." *Id.* at 2804 (citing *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987)). Instead, the Confrontation Clause only " 'reflects a preference for face-to-face confrontation at trial,' " which preference "may be overcome in a particular case if close examination of 'competing interests' so warrants." *Id.* (quoting *Ohio v. Roberts*, 448 U.S. at 63-64) (emphasis in original). In particular, the concurring opinion noted that:

[v]irtually all of our cases approving the use of hearsay evidence have implicated the literal right to "confront" that has always been recognized as forming "the core of the values furthered by the Confrontation Clause," *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934-1935, 26 L.Ed.2d 489 (1970), and yet have

fallen within an exception to the general requirements of face-to-face confrontation.

*Id.* at 2804-05. The concurrence noted the Court's traditional recognition that hearsay statements of unavailable witnesses are admissible despite the strict wording of the Confrontation Clause:

"[A] literal interpretation of the Confrontation Clause could bar the use of any out-of-court statements when the declarant is unavailable," but we also acknowledged that "this Court has rejected that view as 'unintended and too extreme.' "

*Id.* at 2805 (quoting *Bourjaily v. United States*, 483 U.S. 171, 182 (1987)).

Finally, the dissenting opinion of Justice Blackmun in *Coy* pointed to "the exceptions to the rule against hearsay, which allow the admission of out-of-court statements against a defendant." He saw the hearsay exceptions as proof that "the ability of a witness to see the defendant while the witness is testifying does not constitute an essential part of the protections afforded by the Confrontation Clause . . . ." *Id.* at 2807. The dissent argued that "many hearsay statements are made outside the presence of the defendant, and thus implicate the confrontation right asserted here. Yet . . . this interest has not been the focus of this Court's decisions concerning the admissibility of such statements." *Id.* 108 S.Ct. at 2808.

In short, none of the opinions in *Coy* in any way suggest that the Sixth Amendment literal language guaranteeing the accused the right to be "confronted with the witnesses against him" empowers a defendant to bar the

admission of reliable hearsay statements of child sexual abuse victims who are unavailable at trial.<sup>3</sup>

#### B. A Functional Reading of the Confrontation Clause Does Not Exclude Reliable Hearsay of Unavailable Witnesses

The Confrontation Clause does not dictate only how statements will be made by those who testify at trial. To so limit the clause would focus too narrowly and exclusively on what Justice Brennan has called the "symbolic goals" of the clause. *Lee v. Illinois*, 476 U.S. 530, 540 (1986).<sup>4</sup>

Such a reading of *Coy* would unfairly ignore the "functional" component of the Confrontation Clause, which this Court identifies with the right to cross-examination.

The right to cross-examination, protected by the Confrontation Clause, thus is essentially a "functional" right designed to promote

<sup>3</sup> "The language [of the Confrontation Clause] is particularly ill-chosen if what was intended was a prohibition on the use of any hearsay . . . ." *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J. concurring) (bracketed material added).

<sup>4</sup> There is precedent for interpreting the clause in this narrow manner. Justice Harlan "sought to limit the clause to a procedural rule partly because no 'linguistic or historical evidence' compelled a broader reading." 102 Harvard L. Rev. 143, 156 (1988) (quoting Harlan, J. concurring in *Dutton v. Evans*, 400 U.S. 74, 95) (emphasis in original).



reliability in the truth-finding functions of a criminal trial.

*Kentucky v. Stincer*, 482 U.S. 730, 737 (1987).<sup>5</sup>

If this "functional" or "pragmatic" component of the Confrontation Clause were not recognized, the Clause itself would be trivialized in the protections it provides, and the door would be thrown open to evasion, circumvention and subterfuge:

[I]nterpreted literally the clause could easily be evaded: instead of calling eyewitnesses to a crime to testify, the state could put on witnesses who would merely recite what those eyewitnesses had told them.

*Nelson v. Farrey*, 874 F.2d 1222, 1226 (7th Cir. 1989). The result would be "ex parte testimony submitted by deposition and affidavit." *California v. Green*, 399 U.S. at 180 (Harlan, J., concurring). This would lead ineluctably to "trial by affidavit," the very "paradigmatic evil the Confrontation Clause was aimed at . . . ." *Dutton v. Evans*, 400 U.S. at 94 (Harlan, J., concurring). This Court has carefully preserved the right to cross-examination as the functional or pragmatic component of the Confrontation Clause, to avoid "a miscarriage of justice, which is to say, the conviction of an innocent person by use of unreliable hearsay." *Nelson v. Farrey*, 874 F.2d at 1228.

At the same time, one cannot lose sight of the fact that the "function" served by recognizing a right to cross-

<sup>5</sup> "[T]he [confrontation] clause is given a pragmatic rather than a rigid, literal construction." *Barker v. Morris*, 761 F.2d 1396, 1399 (9th Cir. 1985) (Kennedy, J.).

examination as an implied component of the Confrontation Clause is simply "to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. at 737. The functional component of the Confrontation Clause has never been interpreted to ban all hearsay, merely such hearsay as is unnecessary or unreliable. "[The Confrontation Clause] countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Ohio v. Roberts*, 448 U.S. at 65, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934).

The Confrontation Clause, in short, does not guarantee that the declarant of every out-of-court statement admitted at trial must be subjected to cross-examination at trial before the jury. On the contrary,

the Confrontation Clause guarantees only "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. at 20. This limitation is consistent with the concept that the right to confront is a functional one for the purpose of promoting reliability in a criminal trial.

*Kentucky v. Stincer*, 482 U.S. at 739. An interpretation of the Confrontation Clause's functional component, which guarantees a defendant the right to cross-examine his accuser, so as to ban all reliable hearsay statements of unavailable witnesses would exact too high a price of the truth-finding function. As the Federal Rules of Evidence Advisory Committee stated regarding the admissibility of hearsay statements: "[W]hen the choice is between evidence which is less than best and no evidence at all, only

clear folly would dictate an across-the-board policy of doing without." Advisory Committee's Introductory Note on the Hearsay Problem, quoted in Westen, *The Future of Confrontation*, 77 Mich. L.Rev. 1185, 1193, n. 35 (1979).

This opportunity to cross-examine is satisfied where the witness who hears and testifies to the hearsay is fully available to be cross-examined as to the circumstances under which the hearsay was received. See *Dutton v. Evans*, 400 U.S. 74 (1970) (defendant's ability to cross-examine inmate who overheard co-conspirator blame defendant for murder satisfied requirements of Confrontation Clause); *Tennessee v. Street*, 471 U.S. 409 (1985) (Confrontation Clause's fundamental role in protecting the right of cross-examination satisfied by defendant's ability to freely cross-examine sheriff who read non-hearsay aspects of co-conspirator's confession to the jury).

In the present case, Laura Lee Wright had a full opportunity to cross-examine Dr. Jambura, the pediatrician to whom the younger daughter made the statements incriminating her father and, by implication, her mother. The jury was fully able to discern the circumstances under which the incriminating statements were made and to weigh those statements against the totality of the evidence. Wright's "opportunity for effective cross-examination" of available witnesses was thus satisfied. The Sixth Amendment imposes no additional requirements such as the three rigid litmus tests that the Idaho Supreme Court imposed in this case as conditions precedent to the introduction of child victim hearsay statements.

## II.

### CONSIDERATIONS OF NECESSITY AND TRUSTWORTHINESS MUST TAKE ACCOUNT OF THE UNIQUE SITUATION OF CHILD SEXUAL ABUSE VICTIMS

Traditionally, this Court has looked to two factors – necessity and trustworthiness – in determining whether a category of hearsay qualifies as an exception to the Confrontation Clause. *Mattox v. United States*, 146 U.S. at 152; *Ohio v. Roberts*, 448 U.S. at 65. These same two factors apply in this case, but each must take account of the unique circumstances of the child sexual abuse victim.

#### A. Admission of Hearsay Statements of Child Sexual Abuse Victims Is Justified by the Necessities of the Case

In the second *Mattox* appeal, this Court acknowledged that admitting prior testimony of deceased witnesses ran "directly contrary to the letter" of the Confrontation Clause. 156 U.S. at 243. The Court explained that such testimony was "admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, *simply from the necessities of the case*, and to prevent a manifest failure of justice." *Id.* at 244 (emphasis added).

The Court quoted this language approvingly in *Ohio v. Roberts*, where it noted that "competing interests, if 'closely examined,' *Chambers v. Mississippi*, 410 U.S. at 295, may warrant dispensing with confrontation at trial." 448 U.S. at 64. The Court in *Roberts* then elaborated on the first of the two separate ways in which the Confrontation Clause restricts the range of admissible hearsay:

First, in conformance with the Framers' preference for face-to-face accusation, *the Sixth Amendment establishes a rule of necessity*. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.

*Id.* at 65 (emphasis added).<sup>6</sup>

Justice O'Connor, in her concurrence in *Coy v. Iowa*, recognized that the protection of child sexual abuse victims would justify court procedures other than face-to-face confrontation, thus meeting the "rule of necessity" test laid down in *Roberts*:

I would permit use of a particular trial procedure that called for something other than face-to-face confrontation *if that procedure was necessary to further an important public policy*. [Citation omitted.] The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy.

108 S.Ct. at 2805 (emphasis added).

The necessity for allowing hearsay statements of child sexual abuse victims springs first from the unique nature of the crime itself. Child abuse, as this Court has

<sup>6</sup> We need not explore the extent to which this seemingly absolute requirement of demonstrating unavailability may have been modified by the Court's later decision in *United States v. Inadi*, 475 U.S. 387 (1986) (holding that co-conspirator's hearsay statements may be admitted even without a showing of unavailability). It is uncontested in this case that the trial court found the two-and-one-half-year-old daughter incapable of testifying and thus that she was "unavailable" at trial.

noted, "is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. at 60. Compounding the problem is the fact that sex abuse frequently occurs within the home at the hands of a relative or friend. Crimes of sexual abuse are "predominantly nonviolent in nature" and thus "[p]hysical corroboration is rare." Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Columbia L. Rev. 1745, 1749-50 (1983). The simple fact is that in sex abuse cases the child victim's hearsay statements "often constitute the only proof of the crime." *Id.* at 1749. To exclude such statements merely because they have not been given in court would cripple the judicial process.

The unique nature of the child sex abuse victim provides a second ground of necessity for admitting out-of-court statements. The child, as the trial court found in the present case, may be so young as to be testimonially incompetent, under Rule 601.<sup>7</sup> Although the child may know the difference between the truth and a lie, and may be able to communicate on a one-to-one basis and to recall events accurately, she may be totally unable to communicate when placed in the trial setting.

<sup>7</sup> Idaho Rule of Evidence 601 differs from Federal Rule of Evidence 601 in that the Idaho Rule provides a specific test for competency ("Person whom the court finds to be incapable of receiving impressions of the facts respecting which they are examined, or of relating them truly.") while the Federal Rule is more general ("Every person is competent to be a witness except as otherwise provided in these rules.") and references state law when a state claim or defense is at issue.



In these and similar instances, the child's prior out-of-court statements will have some of the same qualities as those of the co-conspirator discussed in *United States v. Inadi*, 475 U.S. 387, 395-96 (1986). Like the co-conspirator's statement in *Inadi*, the out-of-court statements of a child sexual abuse victim are not simply "a weaker substitute for live testimony" such that "there is little justification for relying on the weaker version." 475 U.S. at 394. Like the co-conspirator's earlier statement, the child victim's earlier out-of-court statement to parents, relatives, school counselors, pediatricians, psychologists and others "has independent evidentiary significance of its own . . ." *Id.*, and oftentimes "cannot be replicated, even if the declarant testifies to the same matters in court." *Id.* at 395. Statements made by very young child victims in a relaxed setting to a trusted adult "are made in a context very different from trial, and therefore are usually irreplaceable as substantive evidence." *Id.* at 396.

Nothing would be gained and much would be lost to the truth-finding function if statements by extremely young or traumatized victims were held inadmissible simply because the child was not available for cross-examination at trial. Where sufficient indicia of reliability of the out-of-court statement are established, Judge Posner's words apply:

[W]e should not allow labels and lawyers' pieties to delude us into believing that cross-examination of a four-year-old child concerning sexual abuse by her father a year earlier is a more effective method of discovering the truth than listening to and weighing the testimony of a competent psychologist who interviewed the

child over a period of many months in a setting designed to elicit truthful communication.

*Nelson v. Farrey*, 874 F.2d at 1230. A rule that would deprive the trier of fact of statements that are "usually irreplaceable as substantive evidence" would reward those who prey upon the youngest, most vulnerable and most dependent victims of society. Such a rule would be intolerable.

The necessity for admitting hearsay statements of abused children draws a final justification from the unique need, in child sex abuse cases, to "protect victims from being abused a second time by the criminal justice system." 102 Harvard L. Rev., *supra* at 151.<sup>8</sup> This Court has long recognized the necessity for admitting hearsay of an absent declarant if the accused himself is responsible for the declarant's absence.

The Constitution does not guaranty an accused person against the legitimate consequences of his own wrongful acts. It grants him the *privilege* of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

*Reynolds v. United States*, 98 U.S. 145, 158 (1878) (emphasis in original). The child who has been so traumatized that

<sup>8</sup> See Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Criminal Justice Journal 1 (1983); Note: *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harvard L. Rev. at 806, 807, n.12 (1985).

he or she cannot appear in court and face the defendant is like the witness who has been killed or otherwise kept away from the trial by the defendant's own wrongdoing. In such circumstances, the child's out-of-court statements are admissible:

The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong. . . . It is the outgrowth of a maxim based on the principles of common honesty, and, if properly administered, can harm no one.

*Id.* at 159. A contrary rule, one that would ban reliable hearsay statements of child sexual abuse victims who have been successfully traumatized into silence or paralysis, would be intolerable: "If such evidence were never admissible, molesters of small children, especially incestuous molesters, would rarely be punished." *Nelson v. Farrey*, 874 F.2d at 1229. "[H]ow ironic it would be if the child molester could use the trauma inflicted on his own victim as the fulcrum for leveraging his way to freedom." *Id.* at 1230. Such a spectre recalls Justice Cardozo's famous warning in *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 122 (1934): "There is danger that the criminal law will be brought into contempt - that discredit will even touch the great immunities asserted by the Fourteenth Amendment - if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

Justice O'Connor, in her concurrence in *Coy v. Iowa*, predicted that the primary focus on Confrontation Clause exceptions fashioned to protect young sex abuse victims "will be on the necessity prong." 108 S.Ct. at 2805. When,

as in the present case, the trial court makes a specific finding that the child victim is unavailable at trial, surely the necessity prong has been met and the child's reliable hearsay statements should be admissible. In such cases "the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses." *Id.*

#### **B. The Out-of-Court Statements of Unavailable Child Sexual Abuse Victims Are Admissible if Established as Reliable**

Once a finding of unavailability is made, the prosecution must establish the trustworthiness of the statement in order to be excepted from the Sixth Amendment's requirement of face-to-face confrontation. Hearsay statements, as this Court has repeatedly noted, meet the test of trustworthiness and are admissible only if they bear adequate "indicia of reliability":

The focus of the Court's concern has been to insure that there "are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant," *Dutton v. Evans*, *supra*, at 89, and to "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement," *California v. Green*, *supra*, at 161.

*Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972). The "indicia of reliability" test can be met in either of two ways:

Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a

showing of particularized guarantees of trustworthiness.

*Ohio v. Roberts*, 448 U.S. at 66.

# 1. The Firmly Rooted Hearsay Exceptions Often Function to Exclude Reliable Hearsay Testimony of the Unavailable Child Sexual Abuse Victim

Until recently, prosecutors have attempted to introduce child victim hearsay statements under one of the "firmly rooted" hearsay exceptions found in Rule 803(1)-(23) of the state and federal rules of evidence. The attempt is fraught with uncertainty and frustration.

Most frequently, statements were proffered under the "excited utterance" exception of Rule 803(2). This exception, however, often proved a poor fit. The child victim may not display the shock or trauma that adults expect, *Brown v. United States*, 152 F.2d 138 (D.C. Cir. 1945); or the child may not report the incident immediately, *Fitzgerald v. United States*, 443 A.2d 1295 (D.C. 1982). Strict application of the excited utterance rule will serve to exclude such out-of-court statements. Unfortunately, the empirical evidence suggests that children, especially victims of incest, frequently experience little shock from the sexual molestation by a loved one and may allow many years to elapse before reporting an incestuous relationship or incident. 83 Columbia Law Rev. at 1757.

Similarly, the attempt to admit child hearsay statements under the medical treatment exception, Rule 803(4), sometimes runs into problems if the child is too young to understand the doctor-patient relationship or if

the interview is conducted by a family pediatrician outside the normal doctor-patient relationship or setting. Unless the court is willing to stretch the usual ground-rules for the medical exception, the hearsay may prove inadmissible.<sup>9</sup>

The use of the "firmly rooted hearsay exceptions," in short, often stretches the exceptions beyond their traditional bounds. When this occurs, strictly speaking, the exceptions no longer have the character of "a firmly rooted hearsay exception." The result in many instances is the rejection of obviously probative out-of-court statements. The result in all instances is intolerable uncertainty.<sup>10</sup>

The basic problem is that the traditional, "firmly rooted" hearsay exceptions rely on particular indicators of trustworthiness, e.g., shock, trauma, excitement, spontaneity, or narration to an acknowledged professional.

<sup>9</sup> Note, *State v. Smith: Facilitating the Admissibility of Hearsay Statements in Child Sexual Abuse Cases*, 64 N.C.L. Rev. 1352 (1986); Note, *Evidence - Hearsay Child Abuse and Neglect - A Child's Statements Naming an Abuser Are Admissible Under the Medical Diagnosis or Treatment Exception to the Hearsay Rule - Goldade v. State*, 674 P.2d 721 (Wyo. 1983), 563 U. of Cinn. L. Rev. 1155 (1984); Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. Rev. 257 (1989).

<sup>10</sup> "Courts have thus tended to stretch existing hearsay exceptions to accommodate a child victim's out-of-court statements because they are deemed uniquely necessary and trustworthy. The problem with 'stretching' the existing exceptions in this manner is the destruction of the certainty and integrity of the exceptions." *State v. Myatt*, 697 P.2d 836, 842 (Kan. 1985).



This reliance on traditional criteria of adult trustworthiness results in the exclusion of other indicia of reliability more appropriate to children. *Id.* at 1756.

**2. The Totality of the Circumstances Must be Evaluated to Determine Whether "Particularized Guarantees of Trustworthiness" Exist**

In the present case, the trial court found sufficient "circumstantial guarantees of trustworthiness" to admit the out-of-court statements of the two-and-one-half-year-old victim under Rule 803(24). Although the court did not apply Idaho's child victim hearsay statute, Idaho Code § 19-3024,<sup>11</sup> the state submits the statements would have met the equivalent "indicia of reliability" test of the statute as well. While accepting this finding of the trial court regarding the reliability of the identical hearsay testimony for Rule 803(24) purposes,<sup>12</sup> the Idaho Supreme Court nonetheless found the testimony insufficiently reliable for Confrontation Clause purposes.

In *Ohio v. Roberts* the Court did not explain in detail how a non-firmly-rooted hearsay exception should be evaluated to determine whether sufficient "particularized guarantees of trustworthiness" existed to pass muster

<sup>11</sup> The Idaho Supreme Court has ruled that matters of procedure are to be controlled by rules of the court, not by statutory enactments of the legislature. *State v. Currington*, 108 Idaho 539, 700 P.2d 942 (1985).

<sup>12</sup> In the companion case of *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989), the Idaho Supreme Court affirmed Giles' conviction, holding that the identical hearsay statement was properly admitted pursuant to Rule 803(24).

under the Confrontation Clause. Guidance on this issue was provided most recently in *Bourjaily v. United States*, where the Court explored the limits the Confrontation Clause places on the admissibility of the out-of-court statement of a co-conspirator. While the context in *Bourjaily* was Rule 801(d)(2)(E), found to be a firmly rooted hearsay exception, the Court's analysis applies equally well in determining whether statements proffered under the residual hearsay exception, Rule 803(24), or under contemporary child victim hearsay statutes and rules, bear "particularized guarantees of trustworthiness." As explained by the Court:

Petitioner's theory ignores two simple facts of evidentiary life. First, out-of-court statements are only *presumed* unreliable. The presumption may be rebutted by appropriate proof. . . . Second, individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.

483 U.S. at 179-180 (emphasis added).

The State of Idaho suggests, in light of the principles spelled out in *Roberts* and *Bourjaily*, that the proper approach in evaluating whether sufficient "particularized guarantees of reliability" exist to comply with the Confrontation Clause is to review on a case-by-case basis the

totality of the circumstances<sup>13</sup> surrounding the alleged sexual abuse and the making of the statement.

An initial, though partial, listing of the circumstances that a trial court should consider in determining the reliability of a hearsay statement was provided by this Court two decades ago in *Dutton v. Evans*, where the plurality considered several factors in evaluating the reliability of a hearsay statement of a co-defendant: the declarant's personal knowledge about the identity and role of the individuals involved in the crime 'was abundantly clear; the possibility that the statement was founded upon faulty recollection was remote; and the circumstances under which the statement was made (its spontaneity and the fact that it was against declarant's penal interest) gave reason to suppose that the declarant did not misrepresent the defendant's involvement in the crime. 400 U.S. at 88-89.

Other particularized guarantees of trustworthiness, more closely tailored to the unique circumstances of the child sexual abuse victim, were enunciated by the Eighth Circuit Court of Appeals in *United States v. Dorian*, 803 F.2d 1439 (8th Cir. 1986). That case concerned the hearsay statements of a five-year-old to her foster mother regarding sexual abuse by her father. The girl was called to the stand at trial, "but because of her age and obvious fright, she was unable to testify meaningfully." 803 F.2d at 1443.

<sup>13</sup> The North Carolina Supreme Court appears to have first applied the phrase "totality of the circumstances" to this context. See *State v. Deanes*, 374 S.E.2d 249, 256-57 (1988), cert. denied, 109 S.Ct. 2455 (1989).

The trial court permitted the foster mother to testify to the child's out-of-court statements.

The Eighth Circuit, after reviewing the record, held that the following factors made the hearsay admissible: the interviewers, including the child's foster mother, asserted they were careful not to use leading or suggestive questions; the child revealed the molestation only by stages, which an expert affirmed was typical of child sex abuse victims; the girl's description of the incident was "graphic but child-like" with a distinct "ring of veracity" (he "put his boy thing in the hole between my legs"); and her description of an erect penis was not normally a matter within the knowledge of a five-year-old girl. *Id.* at 1444-45. The Eighth Circuit further noted that the child's statement was corroborated by other evidence:

the descriptions of her fearful behavior around men; her terror when the physician's assistant prepared to conduct a vaginal examination; her disturbed behavior when told she was going home, which stopped when she learned her father would not be there; . . .

*Id.* at 1445. Finally, the court observed that "the medical evidence, although inconclusive, was certainly consistent with sexual abuse." *Id.* The court concluded that the child victim's hearsay statements were admissible under both the residual exception, Rule 803(24), and the Confrontation Clause of the Sixth Amendment. Other federal courts have likewise upheld the admission of out-of-court statements made by child victims of sex abuse. *Accord Nelson v. Farrey*; *United States v. St. John*, 851 F.2d 1096, 1098 (8th Cir. 1988); *Morgan v. Foretich*, 846 F.2d 941, 946 (4th Cir. 1988); *United States v. Cree*, 778 F.2d 474, 477-78 (8th Cir.

1985); *United States v. Nick*, 604 F.2d 1199, 1204 (9th Cir. 1979).

The Montana Supreme Court promulgated its own "Child Hearsay Guidelines" in the course of its opinion in *State v. J.C.E.*, 767 P.2d 309 (Mont. 1988). While the context was that of the residual hearsay exception for unavailable witnesses, Rule 804(b)(5), the factors listed provide a systematic approach for a trial court to follow in determining whether the unavailable child victim's out-of-court statement meets the "particularized guarantees of trustworthiness" test of the Confrontation Clause. The Montana court prescribed twenty different factors the trial court might weigh in five different categories: (1) the attributes of the child hearsay declarant; (2) the witness relating the hearsay statement; (3) the statement itself; (4) the availability of corroborative evidence; and (5) other considerations. 767 P.2d at 315-316. *See also State v. Sorenson*, 421 N.W.2d 77, 84-85 (Wis. 1988) (factors to be weighed include the attributes of the child making the statement; the person to whom the statement was made; the circumstances under which the statement was made; the content of the statement itself; and other corroborating evidence).<sup>14</sup>

<sup>14</sup> More than half of the states now provide for a child sexual abuse hearsay exception either by statute or by court rule:

Alaska Stat. § 12.40.110 (1985); Ariz. Rev. Stat. Ann. 13-1416 (Supp. 1987); Ark. R. Evid. 803(25)(A); Cal. Evid. Code § 1228 (West. 1985); Colo. Rev. Stat. 13-25-129 (1987); Fla. Stat. § 90.803(23) (Supp. 1988); Georgia Evidence Code § 24-3-16 (1986); Idaho Code § 19-3024 (1987); Ill. Ann. Stat. ch. 38, para.

(Continued on following page)

A caveat is in order. The goal is to consider the totality of the circumstances, not to substitute a new mandatory checklist, no matter how comprehensive. *State v. J.C.E.*, 767 P.2d at 315. The reliability factors "are not to be considered exhaustive, nor are all factors required to be present in order to admit the declarations." *United States v. Fleishman*, 684 F.2d 1329, 1339 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982). Or, as Judge Kennedy stated, in considering the admissibility of videotaped hearsay statements of a deceased declarant:

There is no mechanical test for determining the reliability of out-of-court statements. (Citation omitted.) Each case must be evaluated on its own facts. (Citations omitted.) The inquiry in each case must reflect "a practical concern for the truth-determining process."

*Barker v. Morris*, 761 F.2d at 1400.

(Continued from previous page)

115-10 (Smith-Hurd 1984); Ind. Code Ann. § 35-37-4-6 (Burns 1985); Iowa Code § 232.96(6) (1985); Kan. Stat. Ann. 60-460(dd) (1983); Ky. Rev. Stat. Ann. 421.355 (Michie/Bobbs-Merrill 1988 Cum.Supp.); Me. Rev. Stat. Ann. tit. 15, § 1205 (1989 Cum.Supp.); Md. Cts. & Jud. Proc. Code Ann. § 9-103.1 (1988 Cum. Supp.); Minn. Stat. Ann. § 595.02(3) (West 1988); Miss. Code Ann. § 13-1-403 (1989 Cum.Supp.); Mo. Rev. Stat. § 491.075 (1985); Nev. Rev. Stat. § 51.385 (1987); N.J. Rule 63(33), N.J. Rules of Evidence (1989); N.D. Rule 803(25), N.D. Rules of Evidence (1990); Okla. Stat. Ann. tit. 12, § 2803.1 (West Supp. 1987); 42 Pa. Cons. Stat. § 5985.1; (Act 100-89); S.D. Codified Laws Ann. § 19-16-38 (1987); Tex. Crim. Proc. Code Ann. § 38.072 (Vernon 1985); Utah Code Ann. § 76-5-411 (1985); Vt. R. Evid. 804a (Supp. 1988); Wash. Rev. Code Ann. § 9A.44.120 (1988).



The test, however, is whether the factors surrounding the making of the out-of-court statement, taken as a whole, indicate trustworthiness, not whether some mechanical list of factors indicating reliability is met.

*Id.* at 1403.

In the final analysis, it is only a totality of the circumstances approach that complies with this Court's requirement that out-of-court statements – whether they are proffered under the residual hearsay exception or the new child sex abuse victim hearsay statutes and rules – must show “particularized guarantees of trustworthiness” to be admissible pursuant to the requirements of the Confrontation Clause of the Sixth Amendment. A mechanical list, by its very nature, will always cast a net that is too narrow or too wide, either excluding testimony that is essential to the criminal justice truth-seeking process and to the protection of society's most innocent victims, or trampling upon the constitutional rights of the criminal defendant.

### **3. The Totality of the Circumstances Test Should Be Applied for Purposes of Both the Residual Hearsay Exception and the Confrontation Clause**

The Court should make it clear in this case that when a trial court applies a totality of the circumstances test – such as that generally mandated in state courts under the residual hearsay exceptions of Rule 803(24) and 804(b)(5), and under many of the newly enacted child sex abuse victim hearsay statutes or rules of evidence – and finds

that circumstantial guarantees of trustworthiness do exist, nothing more is required to demonstrate that the statements pass constitutional muster under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

There are persuasive reasons for holding that the test for hearsay statements under Rule 803(24) is identical to that under the Confrontation Clause. First, the structure of the two tests is almost identical. The rules of evidence first list 23 traditional hearsay exceptions and then recognize a residual category of exceptions when it manifests “circumstantial guarantees of trustworthiness” equivalent to the prior 23. Similarly, the Roberts two-prong constitutional test first establishes “firmly rooted” hearsay exceptions (presumably those recognized for many years), and then a residual category for those manifesting “particularized guarantees of trustworthiness.”

Second, because the language of the residual hearsay exception (“equivalent circumstantial guarantees of trustworthiness”) is virtually identical to that of the second prong of the Confrontation Clause test (“particularized guarantees of trustworthiness”), any attempt to distinguish them will create a distinction without a difference. State courts that have attempted to unravel this problem have, with the exception of the Idaho Supreme Court, concluded that the two standards are indistinguishable. *See State v. Robinson*, 735 P.2d 801 (Ariz. 1987); *Perez v. State*, 536 So.2d 206 (Fla. 1988), *reh'g denied*, 1989, *cert. den.*, 109 S.Ct. 3253 (1989); *State v. Myatt*, 697 P.2d 836 (Kan. 1985).

Third, there is sound precedent for finding congruence between the admissibility tests of the rules of evidence and those of the Confrontation Clause. In *Bourjaily v. United States*, 483 U.S. 171 (1987), this Court affirmed a decision of the Court of Appeals that "the requirements of admission under Rule 801(d)(2)(E) are identical to the requirements of the Confrontation Clause, and since the statements were admissible under the Rule, there was no constitutional problem." 483 U.S. at 182. While the Court based its conclusion on the fact that the co-conspirator exception was "firmly rooted," it took pains to stress that the " 'hearsay rules and the Confrontation Clause are generally designed to protect similar values,' *California v. Green*, 399 U.S. 149, 155, and 'stem from the same roots,' *Dutton v. Evans*, 400 U.S. 74, 86 . . . " 483 U.S. at 182-183. Thus, compliance with a test elaborated over generations in one context should suffice to meet the test elaborated in the other.

Finally, sound policy demands that trial judges who admit out-of-court statements as meeting the test of the residual hearsay exception rule should not be blindsided by additional amorphous Confrontation Clause tests devised by reviewing courts. A holding to this effect will not lead to the "constitutionalization of hearsay rules" throughout the federal and state courts. *California v. Green*, 399 U.S. at 184 (Harlan, J., concurring).

Until this Court rules that the Confrontation Clause requirement of "particularized guarantees of trustworthiness" is met by fulfilling Rule 803(24)'s requirement of "equivalent circumstantial guarantees of trustworthiness," the Confrontation Clause will function as it did in

the present cases, as a trap for the unwary. Most importantly, until the Court clarifies this issue the promise of *Roberts* – to provide "certainty in the workaday world of conducting criminal trials," 448 U.S. at 66 – will remain unfulfilled.

#### 4. The Idaho Supreme Court Erred in Creating Three Conditions Precedent to the Admission of Child Victim Hearsay Statements

The Idaho Supreme Court, in the companion case of *State v. Giles*, held that the hearsay statements of the two-and-one-half-year-old child sexual abuse victim to her examining pediatrician had "circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions," and thus were admissible under the residual hearsay exception, Rule 803(24). 772 P.2d at 195. In the present case, however, the Idaho court held that the same statements were "fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate" and were therefore inadmissible under the Confrontation Clause of the Sixth Amendment to the United States Constitution. 775 P.2d at 1231. The Idaho Supreme Court held that to pass constitutional muster the prosecution must establish that (1) the interview was either audio or videotaped; (2) leading questions were not used; and (3) the examining pediatrician conducting the interview did not have any preconceived idea of what the child should be disclosing.

These three criteria are not so much tests as they are inflexible obstacles. As such, they are at odds with, and frustrate, this Court's directive that hearsay statements of

an unavailable witness are admissible under the Confrontation Clause if the proponent establishes that "particularized guarantees of trustworthiness" exist, *Ohio v. Roberts*, 448 U.S. at 66. Any mechanical "test" violates this standard because it cuts off inquiry into the totality of circumstances that may provide "indicia of reliability." *Id.* The result is that reliable hearsay statements will be excluded and the trier of fact will be denied "a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. at 161. The truth-seeking process is inevitably compromised. The three tests announced by the Idaho Supreme Court in this case are particularly unfortunate.

The suggestion that all interviews containing potential hearsay evidentiary statements should be audio or videotaped is not novel.<sup>15</sup> The defendant in *Nelson v. Farrey* made the same suggestion. Judge Posner rejected it on sound practical considerations: the clinical psychologist did not know at the outset that a revelation would be made leading to a criminal prosecution and thus would not have known he should be videotaping; clients would be rightly outraged if the psychologist routinely taped all interviews in the event that revelations of sexual misconduct might occur; and the videotape would either have to run many hours in order to record every interview session (which would be "unbearably diffuse and tedious"),

<sup>15</sup> This requirement is not, properly speaking, one of the indicia of reliability. Rather, its aim is to tip the scales to the criminal defendant by requiring contemporaneous recording of all potentially inculpatory hearsay statements for his "preservation and perusal at or before trial." *State v. Wright*, 778 P.2d at 1227.

or be edited (which would "tend to magnify the impact of [the victim's] statements about sexual abuse"). 874 F.2d at 1229 (bracketed material added). To these objections might be added the fact that not all psychologists, sociologists, school counselors, pediatricians, and other interviewers have videotaping equipment readily available and unobtrusively situated so as not to draw attention to itself. In impoverished, rural parts of the country the creation of videotaping as a constitutional *sine qua non* would simply work to exclude almost all hearsay statements of child sexual abuse victims.

The Idaho court's second condition precedent to admissibility – that no leading questions be used in interviewing the child sexual abuse victim – is also inappropriate. Leading and suggestive questions, to be sure, are generally frowned upon. Nonetheless, as Professor Myers states in his amicus brief in this case, such questions do not necessarily undermine the reliability of children's hearsay statements and, in fact, may be necessary in some circumstances to elicit reliable information. This is particularly true in the case of very young children.

Professor Myers notes that the legal system itself already recognizes the need and permissibility for leading questions in the case of "the child witness or the adult with communication problems. . . ." Federal Rules of Evidence 611(c), Notes of Advisory Committee on Rules. The federal appellate courts approve the use of leading questions during direct examination of children who are reluctant to testify. See *United States v. Rossbach*, 701 F.2d



713, 718 (8th Cir. 1983); *United States v. Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).

The Idaho Supreme Court's final test – that the pediatrician should have had no preconceived idea of what the child should be disclosing – is not only inappropriate but flies in the face of the fundamental workings of human intelligence. A doctor whose inquiry into symptoms is not guided by preconceived theories and hypotheses is simply untrained and incompetent. Listen to America's foremost educational theorist as he describes the process:

A physician, for example, is called by a patient. . . . [This] sets the problem of inquiry. Certain clinical operations are performed, sounding, tapping, getting registrations of pulse, temperature, respiration, etc. These constitute the symptoms; they supply the evidence to be interpreted. . . . The observations mean something not in and of themselves, but are given meaning in the light of the systematized knowledge of medicine as far as that is at the command of the practitioner. He calls upon his store of knowledge to suggest ideas that may aid him in reaching a judgment as to the nature of the trouble and its proper treatment.

John Dewey, *The Quest for Certainty*, 174 (Capricorn Books 1960). The notion that a doctor, or any other qualified professional, would ever perform an interview without preconceived ideas as to what the patient will be disclosing is not only impractical; it is both undesirable and unattainable in the real world of human inquiry.

**5. The State Established That the Statements of the Two- and-one-half-year-old Victim Made to Dr. Jambura Contained Sufficient "Particularized Guarantees of Trustworthiness" to Comply with the Requirements of the Confrontation Clause**

The trial court found that the statements made by the two-and-one-half-year-old daughter to Dr. Jambura were sufficiently reliable to comply with the requirements of the Confrontation Clause. J.A.119-120. The court explained that (1) there was physical evidence to corroborate that sexual abuse occurred; (2) there was no motive for the two-and-one-half-year-old younger daughter "to make up a story of this nature;" (3) "the nature of the statements themselves as to the sexual abuse are such that they fall outside the general believability that a child could make them up or would make them up;" (4) the younger daughter was in the custody of the defendants at the time the injuries occurred; (5) the older daughter testified that it was the younger daughter's mother and father who were the perpetrators of this sexual abuse; and (6) the perpetrators were well known to the victim. J.A.115. The trial court concluded that the younger daughter's statements to Dr. Jambura were admissible under Rule 803(24) because their "circumstantial guarantees of trustworthiness" were equivalent to statements permitted under some of the firmly rooted hearsay exceptions. J.A.119

In the companion case of *State v. Giles* the Idaho Supreme Court evaluated the hearsay statements of the

two-and-one-half-year-old younger daughter and affirmed the trial court's determination that they "had circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions," which justified their admission pursuant to Rule 803(24). 772 P.2d at 195. In *Giles* the court discussed what factors could appropriately be considered in assessing the reliability of the hearsay:

As indicia of unreliability, appellant cites the alleged suggestiveness of Dr. Jambura's questions (by referring to 'daddy') and the younger daughter's alleged inability to recollect and communicate because of her age. Appellant attempts to distinguish between indicia of reliability and corroborative evidence, and suggests that the latter should not be considered in an I.R.E. 803(24) analysis. . . . The analysis required by I.R.E. 803(24) and *Hester* contemplates that *the trial court will look to all the other evidence to determine whether it tends to corroborate the hearsay statement*, before the trial court concludes that the hearsay statement has the same circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions.

*Id.* at 194 (emphasis added).

The three-member majority of the Idaho Supreme Court, in *State v. Wright*, did not address the trial court's analysis and finding that the statements of the younger daughter to Dr. Jambura had circumstantial guarantees of trustworthiness. Nor did the majority address its own holding in *Giles* just three months earlier that consideration of all the circumstances, including corroborative evidence, was appropriate in evaluating the reliability of the hearsay in question. Instead, the *Wright* court explained:

We fail to see how Wright's right to face-to-face confrontation escaped violation in this event of admission of inculpatory hearsay testimony which did not fall within any of the traditional exceptions and which was brought into evidence as a result of an interview lacking procedural safeguards. The record does not provide the required showing of particularized guarantees of trustworthiness supporting the doctor's statement of the young girl's declarations. Instead, the hearsay declarations of the younger Wright girl are not trustworthy because of Dr. Jambura's interview technique: *the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and blatantly leading questions were used in the interrogation*. Further, the statements lack trustworthiness because *this interrogation was performed by someone with a preconceived idea of what the child should be disclosing*. Because of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura, we conclude that Dr. Jambura's testimony regarding the younger Wright girl's declarations lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause.

775 P.2d at 1227 (emphasis added).

The Idaho Supreme Court in the case at hand looked for the particularized guarantees of trustworthiness required by the Confrontation Clause only in the actual making of the statement. It did not, as many courts have done and as the Idaho Supreme Court itself did in *Giles* just three months earlier, look to all the circumstances surrounding the making of the hearsay statement, including corroborative evidence.

By contrast, the trial court did look to the totality of circumstances surrounding the making of the statement as well as the alleged abuse. In so doing, the court correctly held that the statements of the younger daughter to Dr. Jambura contained sufficient "indicia of reliability" and "circumstantial guarantees of trustworthiness" to admit them without impinging on the protections guaranteed to Laura Lee Wright by the Confrontation Clause of the Sixth Amendment. J.A.115, 119.

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### CONCLUSION

The out-of-court statements of the two-and-one-half-year-old sexual abuse victim who was unavailable to testify at trial in this case were reliable and therefore admissible. The constitutional admissibility of such statements should be determined by considering the totality of the circumstances surrounding the statement and the alleged sexual abuse. This test provides predictability in determining whether the statement manifests sufficient indicia of reliability to be admissible at trial. Any other test threatens to exclude reliable statements that otherwise demonstrate particularized guarantees of trustworthiness. The Idaho Supreme Court erred in creating three conditions precedent for the admissibility of statements of unavailable child sexual abuse victims. Neither the literal nor the functional reading of the Confrontation Clause imposes such conditions on otherwise reliable hearsay of an unavailable child sexual abuse victim.

The State of Idaho respectfully requests this Court to reverse the judgment of the Idaho Supreme Court.

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1989

THE STATE OF IDAHO,

*Petitioner,*

LAURA LEE WRIGHT,

*Respondent.*

On Writ Of Certiorari  
To The Supreme Court Of Idaho

BRIEF OF RESPONDENT LAURA LEE WRIGHT

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**QUESTION PRESENTED**

Whether the Supreme Court of the State of Idaho ruled correctly that out of court statements of a child, who is incompetent to testify, may not be admitted against a defendant without violating that defendant's confrontation rights when:

- A. The three-year-old witness was found to be unable to receive and communicate just impressions;
- B. The child's statements were found not to fall within any traditional hearsay exception;
- C. The statements were elicited by an interviewer with preconceptions who asked blatantly leading questions; and
- D. The interview was not recorded in any fashion and some of the interviewer's notes, including the child's drawing made during the interview, were lost or destroyed before trial.

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## STATEMENT OF THE CASE

Respondent Laura Wright and co-defendant Bobby Giles were each found guilty of two counts of lewd conduct with a minor and sentenced to 20 years in prison. In her state appeal Ms. Wright challenged her conviction for abusing the younger girl, Kathy. The Supreme Court of the State of Idaho concluded that admission of extrajudicial statements obtained from the younger girl during an investigatory interview violated Ms. Wright's federal confrontation rights and reversed the conviction on that count. The admissibility of those statements is the issue before the Court.

Ms. Wright is the natural mother of the two alleged victims.<sup>1</sup> Co-defendant Bobby Giles is the father of the younger girl, Kathy. Ms. Wright's ex-husband, Louis Wright, is the father of the older girl, Jeannie. The girls were two and a half and five and a half years old, respectively, at the time the offenses allegedly occurred. The girls were three and six by the time of trial.<sup>2</sup>

The sexual abuse allegations were first raised by Ms. Wright's ex-husband, Louis, and Louis' live-in girlfriend, Cynthia Goodman. There had been long-standing animosity between Louis and the two defendants before any

<sup>1</sup> Ms. Wright's parental rights to the girls were terminated in a civil proceeding. Because the decision before this Court for review was based upon confrontation clause violations, rather than upon due process or hearsay rule violations, the ruling in the case below would ordinarily have no effect on the terminations. However, because the only evidence of abuse admitted in the civil case was the judgment of conviction being reviewed by the Court, that termination may be retried.

<sup>2</sup> Tr. Vol. II, p. 456-60.

charges were made.<sup>3</sup> Louis, a convicted felon,<sup>4</sup> had threatened that if he could not have Jeannie, he would see that Laura did not have her either. He threatened to see that the State got custody of her.<sup>5</sup>

Louis had persuaded Laura Wright to sign an agreement giving Louis custody of Jeannie for six months of every year. Laura testified, "[H]e coaxed me into signing a paper stating if I didn't sign the six-month custody deal that he'd skip the State with Jeannie May [Wright]."<sup>6</sup> Doris Gornier, who worked with both Mr. Wright and Mr. Giles, testified she heard several fights between Louis Wright and Robert Giles at work. These fights were about the older girl, Jeannie. Louis would threaten "[t]hat Bobby was not going to raise Jeannie May, and that he would get even with them one way or another."<sup>7</sup>

In early October, 1986, Louis and Cyndi came to get Jeannie for a six month visit. Louis and Laura fought. Laura did not want to let Louis take Jeannie "[b]ecause he did not come by for nine months to see the child, and I figured he wasn't a father at all."<sup>8</sup> Louis took Jeannie purportedly for a quick trip to the 7-Eleven and back but he and Cyndi sped away with Jeannie screaming.<sup>9</sup> Ms. Wright has never been reunited with Jeannie.

<sup>3</sup> Mr. Wright was angry at both Ms. Wright and Bobby Giles. Laura left Louis in 1982 to become involved with Mr. Giles (Tr. Vol. III, p. 525, Ls. 8-9; p. 660, Ls. 14-24).

<sup>4</sup> Tr. Vol. III, p. 489, Ls. 16-18.

<sup>5</sup> Tr. Vol. III, p. 526, Ls. 14-18.

<sup>6</sup> Tr. Vol. III, p. 526, Ls. 14-18.

<sup>7</sup> Tr. Vol. III, p. 652, Ls. 8-20.

<sup>8</sup> Tr. Vol. III, p. 528, Ls. 2-5.

<sup>9</sup> Tr. Vol. III, p. 529, L. 24 - p. 530, L. 18.

One or two days later, Laura met with an attorney to file an action for divorce, seeking child support and full custody of Jeannie. According to the attorney this was October 8th of 1986.<sup>10</sup> Ms. Wright and Mr. Giles agreed that an independent investigator should be appointed by the divorce judge to talk to Jeannie and to investigate the households of both Ms. Wright and Louis Wright to determine the best interests of the child. A divorce complaint and a motion for appointment of an investigator were filed approximately one week later.<sup>11</sup>

Mr. Wright was served with the complaint and the request for an independent investigator but he neither answered nor appeared at the hearing set October 29th, 1986.<sup>12</sup>

On November 9th, 1986, before Ms. Wright could obtain a divorce by default, Mr. Wright and his girlfriend, Cyndi Goodman, made the accusation of sexual abuse to the authorities.<sup>13</sup> This accusation was made more than one month after Louis took Jeannie, and three weeks after he was served with pleadings requesting home studies and custody.

Mr. Wright and Ms. Goodman testified that Jeannie first disclosed sexual abuse on November 8th, 1986. According to Ms. Goodman, Jeannie told her that Bobby [Robert Giles] "would get on top of her and—how did she put it? He would move and move and move and it would hurt . . . [S]he said that Bobby would put his prick in her pussy, as she put it . . . [S]he said that her mom would

<sup>10</sup> Tr. Vol. III, p. 533, Ls. 3-20 p. 612, Ls. 7-15; p. 613, Ls. 4-7.

<sup>11</sup> Tr. Vol. III, pp. 615-617.

<sup>12</sup> Tr. Vol. III, p. 618, Ls. 1-25.

<sup>13</sup> Tr. Vol. II, pp. 333-335; Vol. III, p. 619, Ls. 1-14.

hold her legs apart, you know, and she got down on the floor of the bathroom and she laid down on her back and she pulled her legs apart and showed me how." Ms. Goodman continued, "[S]he said that her mom would cover her mouth like this (indicating) . . . ." She testified Jeannie said her mother would help her wipe herself off.<sup>14</sup>

According to Cyndi's testimony, Jeannie's alleged disclosure included an accusation that Ray Carleton had done the same things to Jeannie and that Jeannie had seen Bobby and Laura doing the same thing to Jeannie's sister, Kathy.<sup>15</sup>

After receiving these accusations and interviewing Jeannie Wright, police and welfare officials took Kathy Wright into their custody for protection and investigation. As part of that investigation, the police and welfare officials took Kathy to a pediatrician, Dr. Jambura, for physical examination and an interview. The dispute before the Court concerns the admissibility of statements the pediatrician elicited from Kathy.

The trial court allowed the pediatrician to testify concerning hearsay statements made to him by alleged victim Kathy Wright. This evidence was admitted over the Defendants' objection. Kathy Wright, who was three years old at the time of the trial and only two years old at the time of the out-of-court statements to Dr. Jambura, did not testify before the jury. The trial judge conducted a *voir dire* examination of Kathy Wright in the presence of Defendants and their attorney but not in the presence of the jury. The defense lawyer and the prosecutor agreed Kathy was not competent to testify.<sup>16</sup>

<sup>14</sup> Tr. Vol. III, pp. 456-60.

<sup>15</sup> Tr. Vol. III, p. 458, Ls. 9-11; p. 460, Ls. 14-20.

<sup>16</sup> J.A. 39.

Dr. Jambura is the pediatrician who conducted a physical examination of Kathy Wright and asked her whether sexual abuse occurred between Kathy and the two co-defendants. Dr. Jambura testified that in the course of his conversation with Kathy, he asked her four "pertinent" questions: 1) "Do you play with daddy?" 2) "Does daddy play with you?" 3) "Does daddy touch you with his pee-pee?" 4) "Do you touch his pee-pee?"<sup>17</sup> According to Jambura, Kathy Wright answered the first two questions by saying "Yes, we play a lot" and expanding on that. She "admitted" that "daddy" did touch her with his "pee-pee," but had no response about whether she had touched her father's "pee-pee."<sup>18</sup> The doctor claimed Kathy then volunteered that her daddy "does do this with me, but he does it a lot more with my sister than me."<sup>19</sup> No video or audio record was made of this interview even though Kathy was in the protective custody of the government, believed to be a victim of sex abuse and the sole purpose of the examination and interview was to gather evidence of the suspected abuse. Jambura lost or destroyed a picture drawn during the interview.<sup>20</sup>

Jeannie Wright did testify at trial.<sup>21</sup> In addition to Jeannie's statements related by Ms. Goodman, *supra*, prior consistent hearsay statements of Jeannie were admitted through counselor Carol Sorini,<sup>22</sup> Detective

<sup>17</sup> J.A. 122.

<sup>18</sup> J.A. 122.

<sup>19</sup> J.A. 122, Tr. Vol. II, p. 389, Ls. 13-14.

<sup>20</sup> J.A. 124.

<sup>21</sup> J.A. 40-90.

<sup>22</sup> Tr. Vol II, pp. 272-289.



Larry Armstrong,<sup>23</sup> psychologist Michael Eisenbeiss,<sup>24</sup> Officer Tom Holst<sup>25</sup> and Dr. Mark Johnson.<sup>26</sup> These prior consistent statements were not objected to by trial counsel.

Both Defendants took the stand and denied the charges.<sup>27</sup> Ray Carleton denied Jeannie's allegations.<sup>28</sup> Although Jeannie's allegations against Mr. Carleton were identical to her allegations against Laura Wright and Bobby Giles (Laura held Jeannie down while Mr. Carleton had intercourse with her<sup>29</sup>) and were made at the same time as the alleged disclosure against the two co-defendants, he was never charged.<sup>30</sup>

Ms. Wright appealed the conviction for abusing the younger girl to the Supreme Court of Idaho.<sup>31</sup> The state court reversed, finding that the interview of Kathy by Dr. Jambura was not conducted in such a manner as to guarantee the accuracy of the child's statements elicited. That court concluded that the state had not shown sufficient particularized guarantees of trustworthiness to justify dispensing with confrontation and cross-examination and admission of Kathy's alleged statements therefore violated Ms. Wright's federal confrontation rights.

<sup>23</sup> Tr. Vol. II, p. 333, Ls. 17-24.

<sup>24</sup> Tr. Vol. II, pp. 418-419.

<sup>25</sup> Tr. Vol. III, pp. 517-518.

<sup>26</sup> Tr. Vol. III, pp. 512-513.

<sup>27</sup> Tr. Vol. III, p. 539; Tr. Vol. III, pp. 669-671.

<sup>28</sup> Tr. Vol. III, p. 638, L. 16 to p. 641, L. 6.

<sup>29</sup> Tr. Vol. III, p. 642, Ls. 12-20.

<sup>30</sup> Tr. Vol. III, p. 626, Ls. 18-20.

<sup>31</sup> Ms. Wright's complaints about the conviction on the other count must be raised in an action for post-conviction relief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Prosecutions of charges of sexual abuse of children present the courts with some of the most challenging legal issues in the criminal law. These prosecutions present unique issues because the child is often the only witness and medical corroboration is often non-existent or equivocal. On one hand, we will not tolerate any rule of evidence which has the practical effect of decriminalizing sex abuse of very young children by making prosecutions of all such crimes impossible.

On the other hand, our society has a long, proud tradition of high integrity and accuracy in fact finding in our criminal justice system. We resolve all factual doubts in favor of the accused. Our society does not tolerate the risk of conviction of innocent people. However, in child sex abuse cases, there is a very real danger that the voices of the innocent may not be heard above the din of expressions of outrage and disgust; that innocent individuals will be buried under our desire to accommodate prosecutors' special needs in these cases.

Many child abuse experts have commented that a large percentage of allegations of child sexual abuse are false. A precise tally of false accusations is impossible without the divine omniscience required to know for certain which allegations are true and which are false. It does seem certain, however, that the portion of these allegations which are false is huge and is growing.<sup>32</sup>

<sup>32</sup> See, e.g., W. Slicker, *Child Sex Abuse: The Innocent Accused*, 91 Case & Comment 12, Nov./Dec. 1986. This article cites several studies showing 40% to 80% of sex abuse allegations are false.

One source of false reports is the pressure upon professionals to report any suspicions whatever.<sup>33</sup> Another source of false reports is custody and divorce litigation.

There is something about the matrimonial action that brings out the very worst in people . . . . Years ago, charges of adultery filled the pages of divorce complaints since proof of such charges could influence a divorce court to give the "innocent" spouse the advantage. When adultery became relatively commonplace, it was the charge of cheating on one's income tax that was used to ruffle the feathers of the other side. After that became old hat, drug abuse was the charge of choice. And then, in the early '80s, when cocaine usage became something seen in so many papers that it too sank to a level where it failed to give anyone a jolt, charges of child sexual abuse started to be made.<sup>34</sup>

Whatever the source of the referral, there is a danger that the children's suggestible minds will be manipulated, intentionally as in a vicious divorce, or innocently by some well-meaning child protection worker.

When it comes to a child's statements about sexual victimization, there are not two possibilities—lying or telling the truth—but three. A child, particularly a very young one, may say what he or she believes is true, even though it is not the truth.

<sup>33</sup> Besharov, *Doing Something About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 Harv. J.L. & Pub. Pol. (The author is a former New York City prosecutor and was director of the National Center on Child Abuse and Neglect.) Between 1976 and 1978, the percentage of unfounded reports of child abuse increased from thirty-five to more than sixty-five percent.

<sup>34</sup> Dobrish, *Representing the Father Who Is Accused of Child Sexual Abuse*, 23 Fam.L.Q. v-viii 465-75, Fall, 1989.

At first blush, this seems a rather unlikely possibility, to say the least. A child believes in sexual abuse which has not taken place. I would certainly be skeptical of such an idea if I hadn't had a chance to see how children are manipulated by adult interviewers—sometimes by a police officer or protective service worker, sometimes by a mental health professional—who have been trained to believe that those who really care and are sufficiently skilled at their work will help the child talk about sexual abuse.

. . . Everything from nightmares to temper tantrums is being listed by the experts as signs that should alert parents to the possibility of sexual abuse.

Coleman, *Has a child been molested?* 7 Cal.Law. 15 (1986).

The Idaho Supreme Court has forged an elegant solution to the problem of how to balance the various interests involved in child sex abuse litigation. The state court found that the admission of the statements of young Kathy Wright did not violate the state hearsay rule but did violate Ms. Wright's confrontation rights.<sup>35</sup> This distinction means similarly obtained statements will be admissible in child custody litigation and in other civil proceedings for the protection of children, which are tried without juries and the overriding purpose of which is the protection of children. These statements cannot be admitted in criminal prosecutions in deference to our country's intolerance of risk of conviction of the innocent and our explicit guarantee of an accused's right to confront his accusers.

<sup>35</sup> The other holding below, that Idaho's hearsay rule is satisfied by a lesser showing of reliability than required by the confrontation clause, is one of state law. Idaho has a "catch-all" hearsay exception identical to F.R.E. 803(24).



The court below recognized that children's memories are subject to suggestion and that it is possible to create a memory, as real to the child as any other, of an event that did not occur.<sup>36</sup> The particular statements before the Court were found to be insufficiently reliable because they were elicited from a very young child by blatantly leading questions asked by an interrogator who had preconceptions about whether abuse had occurred. This improper questioning was particularly dangerous with *this* child because of the inability to communicate she demonstrated in the hearing on competency. She confused such easy questions as What is your name? and How old are you? The leading questions were more dangerous because the interviewer had information and preconceptions about the abuse allegations, thus he had suggestions to impart and a motive to do so. No videotape was made of the questioning and statements so the state was unable to prove the statements elicited by these dangerous techniques were reliable in spite of the techniques used.

Petitioner has misrepresented the holding of the Idaho Supreme Court. The court below did not hold that any use of leading questions prevents use of the statements thereby obtained. The court did not say that statements cannot be admitted unless they were elicited on videotape, nor did the court say that the questioner can possess no knowledge of the allegations. The court below found the statements to be untrustworthy because of the combination of these factors and the record made of this particular child's ability to communicate.

Respondent will discuss each of the factors mentioned by the Idaho Supreme Court and will demonstrate that each factor was properly considered. Ms. Wright will then

<sup>36</sup> Appendix to the Petition, pp. 36-42; 775 P.2d at 1226-1230.

discuss the interrelationship of these factors and show that the lower court was correct in concluding the prosecution had failed to establish sufficient reliability of the statements to justify their admission without confrontation and cross-examination.

#### ARGUMENT-

#### EFFECT OF THE CHILD'S INABILITY TO COMMUNICATE AS A WITNESS

Following *voir dire* conducted out of the presence of the jury, the trial court found Kathy Wright, the child declarant, unable to communicate and, therefore, incompetent to testify as a witness under Idaho's rules of competency.<sup>37</sup> That determination was not challenged by either party.<sup>38</sup> Children are not disqualified merely by their youth from being witnesses in Idaho. This child declarant was ruled incompetent because she demonstrated an inability to respond to simple questions.

Q. Hi, Kathy. Can you tell me your name please?

A. (No audible response.)

Q. Are you kind of scared? Can you tell me your name, and tell me how old you are?

A. Kathy Wright.

Q. Who do you have with you there that you're holding—can you tell me the names of the toys that you have that you're holding?

<sup>37</sup> Rule 601 of the Idaho Rules of Evidence provides: "Every person is competent as a witness except: (a) Incompetency determined by the court. Persons whom the court finds to be incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

<sup>38</sup> J.A. 38-39.



A. Kathy Wright.

Q. That's your name? Okay. How old are you, Kathy? How old are you?

A. My—Kathy Wright.

Q. Can you tell me the names of your father and your mother?

A. (No audible response.)

Q. Can you tell me what they are?

A. What?

Q. Do you know where you are right now?

A. No.

\*\*\*

Q. Can you tell me how old you are, Kathy?

A. Kathy Wright.

\*\*\*

Q. Do you know how many years you've been alive?

A. Six.

Q. Six years. How old do you think you are?

A. Six years. [She was three years old.]

\*\*\*

Q. . . . Do you know what that is over there (indicating)?

A. Star.

Q. Is that a star? That kind of looks like a big scarf doesn't it. . .

(J.A. 32-37)

In ruling the child to be incompetent to testify, the trial judge necessarily found her to be incapable of receiving just impressions of fact or of relating them truthfully. Rule 601(a) Idaho Rules of Evidence. The Idaho Supreme Court was surely entitled to consider this declarant's inability to receive just impressions of facts, or to relate them truthfully, as a factor bearing upon the reliability of the declarations at issue. Kathy's assertions were too unreliable for her to testify and be subjected to cross-examination in the presence of the accused and the jury. Her statements were no *more* reliable because they were related through the paraphrase of the pediatrician and Kathy was not observed by the jury or subjected to cross-examination.

Courts which have considered the effect of incompetency of a declarant on the admissibility of the declarations have generally excluded the statements. The theory supporting exclusion is that if a declarant so lacks the ability to communicate that he or she cannot testify, that declarant's statements are no more reliable because they are given outside of court and then related through another person.

When a trial justice has ruled a witness incompetent to testify because the justice is not convinced the witness is capable of relating a capacity to observe, to recollect, to communicate, or to appreciate truthfulness, the justice has already made the determination that the witnesses' assertions are unreliable. Though there may be instances in which a witness is competent at the time he or she makes an assertion and later, at the time of trial, due to the onset of senility or mental illness, is incompetent, such does not hold true with infants. If an infant is ruled incompetent at the time of trial because she is only four years old, assertions made by that infant a year earlier cannot be considered inherently more reliable.

Logic dictates that, if anything, they may be less reliable.

*State v. Paster*, 5244 A.2d 587, 590 (R.I. 1987).

The court in *Paster* ruled that the child's declarations to a social worker, a doctor, and a counselor all were inadmissible, no matter what hearsay exception was relied upon. That court reasoned that statements made by an incompetent witness do not become more reliable when repeated by an adult in court.

The court in *Paster* left open the possibility that declarations of very young persons may be admissible if the circumstances surrounding those statements contain guarantees of reliability such as spontaneity, excitement and proximity in time to the acts complained of. *Accord*, *Ketcham v. State*, 162 N.E.2d 347 at 251 (Ind. 1959):

If the small child could tell the story to her mother, she could have told it on the witness stand to the jury, where it could be subjected to the usual tests of credibility. It is no answer to say she was too young to be a witness. If such be true, then the credibility of such testimony was not enhanced by having it presented second-handed to the jury by another person.

This is a long-standing rule, according to Wigmore:

The hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements, by way of exception to the rule, therefore presupposes that the assertor possessed the qualifications of a witness.

5 J. Wigmore, *Evidence* 1424 at 255 (Chadbourn Rev. 1974). *See also*, *State v. Ryan*, 691 P.2d 197, 203 (Wash. 1984): "If the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition."

Of those authorities holding the declarations of very young children admissible, the overwhelming majority have done so only when the spontaneity of the statement appears to guarantee its reliability.<sup>39</sup>

Respondent submits the Idaho Supreme Court was entirely correct to consider the incompetence of this declarant, especially the *voir dire* record demonstrating that incompetence, as a factor suggesting unreliability of the statements at issue. At the time of trial this child was unable to give such simple answers as where she was, her name or her age. This was six months *after* the interview by the testifying pediatrician.

It is unrealistic to assume that Ms. Wright could have elicited much useful specific information from the child through cross-examination, since the child responded so poorly to questioning by the trial judge. However, Ms. Wright and the jury would have been helped a great deal in another way if the child had been questioned before the jury. Ms. Wright could have demonstrated for the jury the child's apparent confusion and lack of communication skills. It would be very useful to jurors who are trying to determine what weight to give an out-of-court declaration for those jurors to see that the declarant confuses questions about her name with questions about her age.

Here the evidence lost by the jury and the defendant through denial of cross-examination is not so much what

<sup>39</sup> *See*, 4 J. Weinstein & M. Berger, *Weinstein's Evidence* § 804 (a) (01) at 804-40 (1981); *State v. Ryan*, 691 P.2d 197, 203-04 (Wash. 1984) (1986); *Huff v. White Motor Corp.*, 609 F.2d 286 (7th Cir. 1979) Admission of evidence pursuant to the "catch-all" provisions of the Federal Rules of Evidence 803(24) and 804(b)(5) is conditioned on the declarant's competency at the time he made the statements. "If that mental competence was lacking, so are the guarantees of trustworthiness." 609 F.2d at 284. 38 Baylor Law Rev. 859-75.



the child would have said under cross-examination as how she would have said it. One of the values protected by the confrontation clause is the increased reliability of fact finding when the accuser stands "face to face with the jury so that they may look at him and judge, by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

#### LEADING QUESTIONS DECREASE RELIABILITY OF RESULTING STATEMENTS

The state court cited the use of "blatantly leading" questions as a factor which militated against a finding that the child's statements were reliable. This factor is related to the preconceptions of the interrogator. The danger of leading questions posed by an interviewer with preconceptions of what the child should be disclosing is that the questioning may create a memory of an event which never occurred.

Research shows adults, as well as children, are susceptible to suggestion. *E.g.*, Loftus, Miller & Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. Experimental Psychology: Human Learning and Memory 19 (1978). One source of suggestion is the form of the question, with such subtle differences as the choice of article ("Did you see the . . ." as opposed to "Did you see a . . .") creating a significant difference in the recall of a nonexistent object. Dale, Loftus & Rathbun, *The Influence of the Form of the Question on the Eyewitness Testimony of Preschool Children*, 7 J. Psycholinguistic Research 629 (1978). Some studies show suggestibility decreasing with age. *E.g.*, Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion: An Empirical Study*, 4 L. & Human Behavior 201 (1980).

Children aged nine and twelve and adults were shown a film depicting crimes and then asked questions. Half the questions were misleading. When the groups were retested a week later all groups showed some incorporation of the misleading information from the questions into their memories, however, accuracy increased with the age of the subject. Some studies support the hypothesis that the increase in suggestibility of younger children may be partially accounted for by different susceptibility to "demand characteristics" in the situation, in other words, an increased motivation to provide the responses shown to be appropriate by comments, smiles, and other non-verbal behavior. King & Yuille, *Suggestibility and the Child Witness*, in Children's Eyewitness Memory, 24 (S. Ceci, M. Toglia & D. Ross, eds. 1987). Psychologist Dr. Steve Thurber testified without contradiction at Ms. Wright's trial that it is possible to shape the responses of very young children into sexually bizarre descriptions. These are children with no history of abuse. This shaping has been accomplished merely with nods of the head and saying "um-hum" at appropriate times. (J.A. 138-39). See also, W. McIver, *The Case for a Therapeutic Interview in Situations of Alleged Sexual Molestation*, The Champion, Jan./Feb. 1986:

In this setting (which is "high pressure" to the child, especially a young one) a strongly biased interviewer can shape a child's responses by a method called "successive approximation." Simply put, this means reinforcing or rewarding the child (through smiles, hugs, or statements like "good girl . . . don't you feel better now . . . that's the way") for statements leading up to and finally including those the interviewer wants to hear.

The amicus brief filed by the American Professional Society on the Abuse of Children, *et al* (the child advo-



cates) demonstrates there is need for more research on memory and child development. (Brief of Child Advocate Amici, pp. 16-25). These *amici* concede there is some danger that suggestion can contaminate memories, particularly the memories of very young children. (Id. p. 9). These amici are concerned that occasional use of a leading question might prevent admissibility of a reliable statement.

Neither the Idaho Supreme Court nor Ms. Wright contends that sparing, judicious use of leading questions should prevent use of statements thereby obtained, particularly where the interrogation is recorded for later analysis by independent experts and viewing by a jury. The court below cited the use of the blatantly leading questions employed by the pediatrician in this case as only one of several factors leading to the conclusion the statements were not shown to be reliable. The concession of these *amici*, that leading questions *can* be dangerous to the pursuit of truth, supports the conclusion that the court below was correct in considering this factor. Furthermore, on the ultimate issue of whether abuse occurred, not one of the authorities cited by these *amici* condones any use of such blatantly suggestive, leading questions as those asked in this case.

Courts which have considered the effect of questioning upon admissibility of statements as spontaneous utterances hold that questioning does not necessarily negate the spontaneity which carries assurances of reliability. *E.g.*, "What happened?"—*People v. McNichols*, 487 N.E.2d 1252, 1258 (Ill. App. 1986); *People v. Cherry*, 411 N.E.2d 61 at 67 (Ill. App. 1980): "It is well established that asking the declarant 'what happened' is insufficient to destroy the spontaneity of the response." (4 year old).

Questioning is a factor which can negate the spontaneity which justifies confidence in the trustworthiness of the statement. "The key inquiry . . . is whether the statement would have been made if the questions had not been asked." *People v. Watts*, 487 N.E.2d 1077, 1086 (Ill. App. 1985). *People v. Pullins*, 378 N.W.2d 502 (Mich. App. 1985); *State v. Fader*, 385 N.W.2d 42, 45 (Minn. 1984); *State v. Roy*, 436 A.2d at 1092 (Vt. 1986); *Lyles v. State*, 412 So.2d 458 at 460; *State v. Brown*, 341 N.W.2d 10, 13 (Iowa 1983) (The questions were calculated to elicit information that would otherwise have been withheld).

**THE FACTORS DISCUSSED BY THE STATE COURT—  
PRECONCEPTIONS OF THE INTERROGATOR, USE OF  
LEADING QUESTIONS, THE CHILD'S INABILITY TO  
COMMUNICATE, AND ABSENCE OF VIDEOTAPE RECORD  
—ARE INTERRELATED**

The lower court discussed use of leading questions, preconceptions of the interrogator, absence of a videotape record and the child's inability to meet the state's witness competency requirement as factors weighing against a finding of reliability of the child's statements. The Petitioner mistakenly treats these factors as independent. The opinion below cannot fairly be read to stand for the proposition that absence of a videotape, by itself, or any use of leading questions, without more, would necessarily compel a finding of inadmissibility. The Idaho court did not hold, as suggested by the Idaho Attorney General, that any preconception of the interrogator by itself invalidates the use of a child's statement. The lower court held merely that the use of the blatantly leading questions asked by this interrogator, who had detailed preconceptions, in questioning this particular two and a half year old child, who demonstrated a striking inability to respond to simple questions asked by the trial judge in the compe-

tency hearing, are factors which, when considered with all the other circumstances present in this case, do not guarantee the reliability sufficient to dispense with confrontation under this Court's decisions.

Petitioner criticizes the court below for failing to consider all the circumstances relating to reliability of statements. Petitioner has analyzed in isolation each of the factors discussed by the court below. Petitioner correctly concludes that each of these factors can be present and yet other circumstances can justify a high degree of confidence in the reliability of a statement. Petitioner is *not* justified in criticizing the reasoning of the court below based upon analysis of each of the factors in isolation. Petitioner, not the Idaho Supreme Court, has failed to consider the totality of the circumstances. The combination of *all* these factors led the state court to conclude the prosecution had failed to establish the reliability of Kathy Wright's statements.

No one disputes that leading questions can taint the memory of children under some circumstances. The danger of suggestion from leading questions increases with the strength of preconceptions held by the questioner. A questioner who has no information or beliefs concerning a child is unlikely to impart suggestions to that child. A questioner who has strong and detailed beliefs is more likely to suggest and reward specific details from the child, innocently or otherwise. These two factors, leading questions and preconceptions of the interviewer, are interrelated.

Similar interrelationships exist among all the factors discussed in the Idaho court opinion. For example, the fact that this particular child was unable to answer direct and simple questions such as Who are your parents? and

How old are you? casts grave doubts about the reliability of the child's responses to such blatantly leading questions as "Does Daddy touch you with his pee-pee?"

#### VIDEOTAPING INTERVIEWS OF CHILDREN BELIEVED TO BE VICTIMS SATISFIES MANY OF THE GOALS OF THE CONFRONTATION-CLAUSE

##### THE SIGNIFICANCE OF VIDEOTAPING

The commentators are in almost universal agreement that investigatory interrogations of children suspected to be victims of abuse should be videotaped.<sup>40</sup> As Dr. Thurber testified at the trial:

A. One consistent recommendation in the sexual abuse area is that on the initial interview by a professional, that the interview session itself be videotaped. Thus other professionals independently can evaluate the quality of the interview techniques. That's the only way.

Q. Is an audio tape valuable?

A. In lieu of, or as a substitute for the video tape?

<sup>40</sup> R. Underwager & H. Wakefield, *Interviewing the Alleged Victim in Cases of Sex Abuse: The Role of the Psychologist*, *The Champion*, Jan./Feb 1987 at 19: "Videotape or audiotape all interviews from the beginning. This provides for fully documented interviews and an accurate account of who said what can be transcribed. Videotape also permits examination of at least some of the nonverbal cues that may be present. In cases we have examined, often only the later interviews are videotaped. There is therefore no documentation of what was done in the first interviews. The lack of documentation leaves room for speculation about possible biasing or prejudicial behaviors." (Emphasis in original.) D.C. Moss, *Do Kids Lie?*, A. B. A. J., 25 (Dec. 1988); W. Slicker, *Child Sex Abuse: The Innocent Accused*, 91 *Case and Comment* 12 at 14 (1986); L. Coleman, M.D., *Has a Child Been Molested?* *The [Idaho State Bar] Advocate* 9, 10 (March 1987) (reprinted from the July, 1987 issue of *The California Lawyer*).



Q. Of course that won't reflect the nonvocal—

A. Correct. That would be the problem with it. So video tape is always recommended. (J.A. 140).

**VIDEOTAPE RECORDS PROVIDE THE GOVERNMENT AN  
EXCELLENT MEANS OF PROVING CIRCUMSTANTIAL  
GUARANTEES OF RELIABILITY**

The government bears the burden of establishing the particularized guarantees of trustworthiness required by the Court's explanations of the confrontation right. The placement of the burden of proof is consistent with traditional hearsay law analysis. The proponent of hearsay bears the burden of establishing applicability of an exception. This placement of the burden in criminal cases involving unavailable witnesses is justified by analogy to analysis of other constitutional rights applicable to criminal prosecutions.<sup>41</sup> One way the use of videotape is significant to confrontation clause analysis is simply its use as a means of proof. Because videotaping results in preservation of all the circumstances bearing on reliability of an elicited statement, a videotape record is a compelling way for the prosecution to meet its burden of proving reliability.

**VIDEOTAPING PRESERVES EVIDENCE OF THE  
DEMEANOR OF NON-TESTIFYING WITNESSES**

One means by which the right of confrontation contributes to accurate fact finding is by forcing a declarant to testify and to answer sometimes distressing questions in the presence of the jurors "so that they may look at him

<sup>41</sup> *E.g.*, the government must prove the existence of facts excusing a failure to obtain a warrant, *Bumper v. North Carolina*, 391 U.S. 543 (1968) (consent to search); the government must prove the voluntariness of confessions, *Lego v. Twomey*, 404 U.S. 477, 489 (1972).

and judge, by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

Demeanor evidence is important in the instant case, not only to help the jury detect conscious falsification, but also to detect suggestion of memories to the child during the questioning, and to help the jurors decide for themselves whether the young child appeared to be recalling a memory or merely accommodating the doctor's preconceptions. The pediatrician testified that when he asked Kathy "Does daddy touch you with his pee-pee?" Kathy "did admit to that." (J.A. 122) Reasonable jurors viewing a videotape of the interview would have been free to conclude, contrary to the physician's interpretation, that this child who said she was six instead of three and who confused questions about her name with questions about her age, was not admitting anything. Jurors without the physician's preconceptions may have seen the child's behavior as accommodating the questioner—agreeing with his question without regard to content.

**VIDEOTAPE RECORDS CAN BE AS EFFECTIVE A MEANS  
AS CROSS-EXAMINATION FOR AN INNOCENT ACCUSED  
TO PROTECT HIMSELF OR HERSELF AGAINST FALSE  
ACCUSATIONS**

A videotape record provides the accused with a means of self-protection comparable to cross-examination. A recording of the interview will often be more effective than cross-examination of the child could ever be. Children differ from adults in their inability to distinguish memories of fantasized events from memories of actual experiences. Once an event has been suggested to the child by questionable interview techniques, the child's memory of the experience the interviewer has suggested



will be as real to the child as any other. *See, e.g.*, Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion*, 4 Law & Human Behavior 210 (1980); Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 J.Soc. Issues, 33, 34-36 (1984); Goodman & Hegelson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami Law Rev. 181 (1985).

Cross-examination is apt to offer an innocent accused impotent protection from a young witness who is conscientiously and accurately describing a memory created by suggestion of an event that never took place. Once confabulation occurs, the suggested memory is as real as any other. Cross-examination cannot show the child to be lying. She isn't. Cross-examination cannot disclose a motive or bias. The motive isn't hers. It belongs to the questioner who implanted the suggestion.

The confrontation clause has not served to prevent the admission of untruthful testimony. The clause guarantees a means (traditionally cross-examination) of protection against inaccurate testimony.

The confrontation clause has not been applied to prevent liars from testifying. Often, known liars, con artists and felons are the only witnesses available to the prosecution. The clause protects the accused by guaranteeing confrontation and cross-examination, not by preventing such witnesses from testifying. Nor does the clause guarantee the cross-examination will be successful. The Constitution does guarantee the cross-examination will be successful. The Constitution does guarantee a defendant an *opportunity* to test the evidence and to demonstrate for the jury why the evidence should not be used as a basis for conviction.

When confrontation is impossible, the clause has been interpreted to require exclusion of evidence, unless the

evidence is known to be reliable by some means other than confrontation and cross-examination.

The lower court's focus on the existence of a videotape record as a material factor in confrontation clause analysis is sound and is consistent with this Court's explanations of the purposes of the clause. A defendant can employ a complete videotape record of an interrogation of a young child to demonstrate subtle suggestion from improper technique. In this role, the videotape fulfills the function of protection ordinarily filled by cross-examination. The accused can demonstrate and argue to the jury the actual demeanor of the interviewer and the child. This preservation of demeanor evidence aids accurate fact-finding like confrontation ordinarily does.

The decision below advances the purposes of confrontation by encouraging videotaping of all interviews of possible victims of child sexual abuse, and by demanding a videotape record of the elicitation of questionable accusations by suspect means. Videotape records enable defendants to protect themselves against false accusations. Such records of well-conducted interviews facilitate prosecution of genuine offenders.

#### PRACTICALITY OF VIDEOTAPING

The child advocate amici express concern that affirmation of the Idaho Supreme Court will result in many reliable statements being ruled inadmissible. 1

[C]hildren disclose sexual abuse in a wide variety of settings and at unpredictable times. Seldom is a tape recorder or video camera available at the critical moment. Yet, children's statements during interviews may bear all the hallmarks of trustworthiness. Given the myriad circumstances in which children are interviewed interposition of audio or video

recording as a litmus test for reliability leads to the exclusion of reliable evidence. (Child Advocates' Brief at p. 7)

Respondent submits this criticism has absolutely nothing to do with the analysis of the court below. The statements at issue here were not elicited inadvertently. On the contrary, Kathy Wright was in custody for protection and for investigation of suspected abuse. The government had sole custody and control over her. Authorities took her to this doctor specifically to obtain evidence about whether or not abuse occurred. There is absolutely no reason why her interview could not easily have been recorded.

The more inadvertently a statement is obtained, the less danger there is that the statement is the product of suggestion or coercion, and the less need there is for a videotaped record. Someone with no idea a child has been abused is unlikely to influence a child to talk about abuse which has not occurred, at least by accident.

The more a statement is the result of intentional application of efforts to get a child to talk about abuse, the greater is the danger of using the statement as substantive evidence and the greater the need for the protections of videotaping, but the less excuse exists for failing to record elicitation of the statement.

These amici's objection that sex abuse disclosures sometimes develop slowly (Child Advocates' Brief at p. 7) is, in Ms. Wright's estimation, completely without merit. When the counseling sessions of a troubled child start involving discussions of abuse, the therapist can then start the video recorder. That a disclosure may occur over several sessions is completely irrelevant. On "extra long play" mode, six hours of sight and sound can be recorded

on a single standard VHS cassette tape which costs about three dollars. Respondent does not suggest therapists should be forced to record these sessions, only that the statements elicited during these sessions should not be admitted against an accused without confrontation and cross-examination if the therapist elects not to preserve evidence of the circumstances surrounding the statement.<sup>42</sup>

#### SUMMARY OF VIDEOTAPING

The court below did not suggest that videotaping is necessary to admissibility of a young child's statements. The Idaho Supreme Court mentioned the absence of a videotape record as only one of several circumstances which led the court to conclude Ms. Wright's confrontation rights had been violated. The opinion below suggests the prosecution can use a videotape to meet its burden of showing a child's extrajudicial statement is reliable *in spite of* dangerous use of leading questions, asked a very young and easily confused child.

#### EFFECT OF PETITIONER'S MISREPRESENTATION OF THE HOLDING BELOW

The Idaho Attorney General misrepresented the holding in *State v. Wright*, the case petitioned from. The Idaho Supreme Court discussed the use of leading questions, preconceptions of the interrogator, and incompetence of the child in ruling that the particular statements before

<sup>42</sup> The child advocates' concern about confidentiality of videotapes is understandable. However, it is one thing to say those in possession should be careful with the dissemination of evidence; it is quite another to recommend that we forego protecting everyone involved by preserving the best evidence available just because someone might carelessly or irresponsibly misuse the evidence.



that court were insufficiently reliable to justify the conclusion that confrontation and cross-examination would be of no use to the accused and, therefore, could be dispensed with without offense to the Constitution. Ms. Wright suggests the Court should affirm. Each of the factors considered by the Idaho Supreme Court was properly considered and weighed. Alternatively, the Court should dismiss the Petition because the holding of the state court was misrepresented by the Petitioner. The Court granted review on an issue raised by the Idaho Attorney General which issue is not presented by a fair reading of the state court's opinion. Ms. Wright suggests it is inefficient use of the Court's resources to reweigh all the factors and reconsider the factual determinations made by the state court.

If the Court does decide to review the factual determinations made by the court below upon the entire record, Ms. Wright asks the Court to consider the factual matters addressed below.

#### THERE IS NO SUBSTANTIAL MEDICAL CORROBORATION OF THE STATEMENTS

Dr. Jambura testified he thought sexual abuse was "probable," (Tr. Vol. II, p. 396, Ls. 3-6) or as he put it in his report, "possible" (Tr. Vol II, p. 392, Ls. 4-7). He explicitly relied upon "historical evidence from her [Kathy's] sister." (Tr. Vol. II, p. 392, L. 3.). The doctor also relied on Kathy's responses to his very leading question, "Does daddy touch you with his pee-pee?" The fact that "daddy" was the alleged perpetrator added weight to his opinion. "[I]t's not so much a qualitative difference of sexual abuse versus no sexual abuse, but of a quantitative difference of how strongly I would—how strong my opin-

ion would be in that regard." (Tr. Vol. II, p. 384, L. 10 to p. 385, L. 22).

Based solely on his physical examination findings, a swollen and inflamed fourchette, all Dr. Jambura can say about sexual abuse is that it is a "possibility." (Tr. Vol. II, p. 395, Ls. 19-24). In other words, he could not rule it out based on physical evidence. If he expressed more confidence that Kathy was sexually abused, based only on a swollen and inflamed fourchette seen with his unaided eyes, he would be contradicting some very weighty medical research. (See, e.g., Emans, Woods, Flagg & Freeman, *Genital Findings in Sexually Abused, Symptomatic and Asymptomatic Girls*, 79 Pediatrics 778-785 (1987). Emans *et al* examined 305 girls using very sensitive methods which were rigorously controlled for uniform technique. They employed the magnification of a pediatric otoscope and colposcope. The girls belonged to three categories: those who were referred because of sexual abuse, those who had no reported problems (asymptomatic), and those who reported urinary or vaginal-area problems with no history of sexual abuse (symptomatic). Asymptomatic girls were easily distinguished from both sexually abused and symptomatic girls. However, in spite of sensitive and meticulous examinations, *there was no way to distinguish sexually abused girls from non-abused girls who had infections and other vaginal area problems, on the basis of a pelvic examination.*

Dr. Jambura's examination falls short of substantial corroboration. First, he never said he could corroborate sexual abuse based solely on his physical findings, and second, such corroboration based solely on redness and swelling is probably impossible in any event.



**ALLEGED CORROBORATION BY JEANNIE WRIGHT DOES  
NOT JUSTIFY ADMISSION OF THESE STATEMENTS  
WITHOUT CONFRONTATION**

Jeannie Wright testified she had seen the Defendants sexually abusing Kathy. This also must fail as substantial corroboration of Kathy's declarations. It should not be presumed to be accurate. Jeannie's testimony is fraught with all the dangers inherent in children's testimony.

Jeannie made no statements until she had been in her father's custody for one month. Her father and his girlfriend, Ms. Goodman, are not trained, objective professionals. On the contrary, Louis Wright is a convicted felon with the strongest possible motives to program Jeannie by suggesting stories to her which implicated her mother. He took Jeannie by force in the midst of a long-standing, bitter disagreement with Ms. Wright about custody. (Tr. Vol. III, p. 530, Ls. 2-18). He had been served with divorce papers seeking custody and appointment of an independent expert to study the best interests of the child. This service took place weeks before the first alleged disclosure. (Tr. Vol. III, p. 613, Ls. 4-7, pp. 615-617). He had vowed "to get even" with the Defendants "one way or another." (Tr. Vol. III, p. 652, Ls. 8-20). It is very easy for a well-meaning professional to shape a child's memory by *accident*. It would be a very easy matter for a highly-motivated parent to manipulate a child's memory intentionally.

That intentional manipulation occurred is suggested not only by the sworn denials of the Defendants, but also by the disinterested testimony of Ann Tweedy, Jeannie's teacher before Louis took Jeannie away. Ms. Tweedy saw none of the behavioral symptoms of child abuse or other trauma during the time Jeannie was with Ms. Wright. Instead, she saw a well-adjusted child with positive bond-

ing to her mother. (Tr. Vol. III, pp. 553-67). This testimony was corroborated by the neighbors. (*E.g.* Linda Hamby, Tr. Vol III, pp. 572-602).

This behavior is in sharp contrast to how Jeannie behaved *after* Louis took her from Ms. Wright. The testimony of counselor Carol Sorini described a very disturbed Jeannie Wright. (Tr. Vol II, pp. 254-330).

Detective Larry Armstrong testified that allegations which arise in the midst of a custody dispute are inherently suspect. (Tr. Vol. II, pp. 254-330).

Any suggestion and confabulation which occurred in Louis Wright's home during the month prior to the first alleged disclosure was compounded in later interviews. Repetition alone, even with careful, trained interviewers, will entrench a fantasy and make it indistinguishable from memories of real events. Goodman & Hegelson, *supra*, at 187. Detective Armstrong testified he interviewed Jeannie only briefly on the weekend these charges surfaced, because "[s]he had already been interviewed 3 or 4 times that weekend." (Tr. Vol. II, p. 333, Ls. 10-11). Dr. Jambura testified "When I had gotten Jeannie, two physicians had already interviewed her and she was not in the most communicative state." (Tr. Vol. II, p. 393, Ls. 18-20). There is no evidence that *any* of these prior interviews was conducted by a person or persons trained in proper interviewing techniques to avoid suggestion.

By the time she testified at trial, Jeannie had obviously been rehearsed at home. State's Exhibit #9 is a tape recording of Jeannie made by Cynthia Goodman two days before the preliminary hearing. (Tr. Vol. III, p. 467, L. 10 to p. 468, L. 7). In that recording, Jeannie sounds extremely well rehearsed compared to her trial testi-

mony. She repeated the version to her counselor, Carol Sorini, innumerable times before trial.

### SUMMARY AND CONCLUSION

The Idaho Supreme Court noted several circumstances surrounding the elicitation of Kathy Wright's statements, each of which has been recognized as dangerous to the search for truth by the overwhelming majority of courts and commentators. The court below did not, contrary to the assertions of the Idaho Attorney General, hold that any of those factors, by itself, automatically disqualifies a statement from admissibility when confrontation is impossible. Rather, the court below considered these factors and the interrelationships among them and concluded that the prosecution had failed to establish sufficient reliability of Kathy Wright's statements to justify the conclusion that Ms. Wright's confrontation rights were not violated by admission of the statements.

The factors are: 1) the incompetence of the declarant and the marked confusion she demonstrated in response to simple questions, 2) the use of blatantly leading questions by the examiner who was investigating sexual abuse, 3) the preconceptions held by the interrogator, and 4) the absence of any recording of the interview session.

Ms. Wright respectfully submits that each of these factors was properly considered by the court below. Ms. Wright requests the Court to affirm the Supreme Court of Idaho.

Respectfully submitted,

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Supreme Court, U.S.

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In The  
Supreme Court of the United States

October Term, 1989

THE STATE OF IDAHO,

*Petitioner,*

vs.

LAURA LEE WRIGHT,

*Respondent.*

On Writ Of Certiorari  
To The Supreme Court Of Idaho

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I.

PETITIONER HAS CORRECTLY STATED THE HOLDING OF THE IDAHO SUPREME COURT

Respondent asserts that the Court should dismiss the Petition because "[t]he Court granted review on an issue raised by the Idaho Attorney General, which issue is not presented by a fair reading of the state court's opinion." (Resp. Br. draft pp.36-37.)<sup>1</sup> In particular, respondent alleges:

Petitioner has misrepresented the holding of the Idaho Supreme Court. The court below did not hold that any use of leading questions prevents use of the statements thereby obtained. The court did not say that statements cannot be admitted unless they were elicited on videotape, nor did the court say that the questioner can possess no knowledge of the allegations. The court below found the statements to be untrustworthy because of the combination of these factors and the record made of this particular child's ability to communicate.

*Id.* at 16-17.

Justice Huntley, the author of the opinion of the court below, would be surprised to learn that his requirements are to be taken in combination, not separately. Concurring in the result only in the companion case of *State v.*

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<sup>1</sup> Respondent's amicus, the National Association of Criminal Defense Lawyers (NACDL), voices the same argument: "Because the issue presented to this Court misstates the ruling below, *certiorari* was improvidently granted, and this matter should be immediately returned to the state court." NACDL Br. p.4.



*Giles*, 115 Idaho 984, 995, 772 P.2d 191, 202 (1989), Justice Huntley had stated:

I would hold that all declarations of very young children in response to a professional's interrogation are *per se* inadmissible unless they are spontaneous, excited utterances or 1) such declarations are elicited by a competent, trained professional, specifically trained in interviewing child victims and aware of the dangers of suggestibility disclosed in psychological research; and 2) the entire interview is videotaped so the possibility of verbal and non-verbal suggestion can be evaluated later; and 3) the evidence establishes that the child's memory was not confabulated by previous improper interviews.

(Emphasis in original.)

Justice Huntley would have held, "At minimum, the sessions should be video-taped and the examiner should not be permitted to use leading, suggestive and closed-ended questions." *Id.*, 115 Idaho at 988, 772 P.2d at 195. The alert reader will note that Justice Huntley's dissent in *Giles* became, almost verbatim, the Idaho Supreme Court's majority opinion in *Wright*.

Chief Justice Bakes, author of the majority opinion in *Giles*, was uniquely situated to understand the meaning of the Idaho Supreme Court's opinion in *Wright*, to which he dissented:

As I deduce from the opinion's analysis, from now on all hearsay statements by very young children are inadmissible unless they are either (1) uttered spontaneously and excitedly, or (2) made in response to "open-ended" questions from a specially trained professional during a

videotaped interview and the evidence establishes that the child's memory was not "confabulated" by previous improper interviews.

*State v. Wright*, 116 Idaho 382, 389, 775 P.2d 1224, 1231 (1989).

Nor is there the slightest doubt as to the meaning of *Wright* in Idaho's trial courts, where defense counsel have already succeeded in three instances in excluding the out-of-court statements of child sex abuse victims to an aunt, a pediatrician and a mental health therapist on the ground that the hearsay statements were not videotaped. See Reply Brief, Appendix A. In each instance, inadmissibility of the only eyewitness testimony available has meant that the prosecution was unable to proceed.

Finally, respondent's amicus, the American Civil Liberties Union (ACLU), applauds the Idaho Supreme Court's finding "that the truth-seeking function of a trial is impaired by the use against defendant of statements elicited by the prosecution from a young child at an unrecorded interview." ACLU Br. p.26. Indeed, the ACLU urges upon this Court adoption of the same prophylactic rule adopted by the Idaho Supreme Court. As heading II states: "THE CONFRONTATION CLAUSE SHOULD, AT A MINIMUM, REQUIRE THE EXCLUSION OF A CHILD'S STATEMENT ELICITED BY PROSECUTORIAL AUTHORITIES AT AN UNRECORDED INTERVIEW." *Id.* at 20.

Thus, contrary to respondent's objection,<sup>2</sup> the opinion of the Idaho Supreme Court below squarely presents

<sup>2</sup> Respondent is not consistent in objecting to this reading of the court's opinion below. On the one hand, respondent

(Continued on following page)

to this Court the question whether the trial judge may look to the totality of circumstances in determining the admissibility of out-of-court statements of unavailable child sexual abuse victims, or whether such statements are *per se* inadmissible if they violate any of several threshold mechanical requirements – the most crippling of which is a requirement that the statement must be videotaped.

## II.

### THE OUT-OF-COURT STATEMENTS OF A CHILD ARE NOT *PER SE* INADMISSIBLE SIMPLY BECAUSE THE CHILD IS FOUND INCOMPETENT TO TESTIFY AT TRIAL BECAUSE OF INFANCY

Respondent argues that a judicial finding that a declarant is incompetent to testify at trial leads logically to the conclusion that the same declarant's out-of-court statements should generally be excluded. Resp. Br. draft p.20. Amicus NACDL concurs, citing approvingly Wigmore's assertion in the context of dying declarations that "[i]f the declarant would have been disqualified to take the stand by reason of infancy, . . . his extrajudicial

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(Continued from previous page)

argues that "[t]he opinion below cannot fairly be read to stand for the proposition that absence of a videotape, by itself, or any use of leading questions, without more, would necessarily compel a finding of inadmissibility." Resp. Br. draft p.26-27. On the other hand, respondent argues that "[t]he decision below advances the purposes of confrontation by encouraging videotaping of all interviews of possible victims of child sexual abuse, and by *demanding* a videotape record of the elicitation of questionable accusations by suspect means." Resp. Br. draft p.33 (emphasis added).

declarations must also be inadmissible." NACDL Br. p.20, quoting 5 Wigmore, *Evidence*, 1445 (Chadbourn Rev. 1979). Both respondent and amicus NACDL would make an exception for "firmly rooted" exceptions, mainly excited utterances.

Respondent argues that because the trial judge, under Rule 601(a) of the Rules of Evidence, found the younger daughter incompetent to testify at trial, he "necessarily found her to be incapable of receiving just impressions of facts or of relating them truthfully." Resp. Br. draft p.19. Thus, the youngster's "assertions were too unreliable for her to testify" and were certainly "no *more* reliable because they were related through the paraphrase of the pediatrician . . . ." *Id.*

The argument, of course, blurs the two separate components of testimonial incompetency found in Rule 601(a) and assumes that anyone found incompetent must be both (1) "incapable of receiving just impressions of the facts" and (2) incapable "of relating them truly."<sup>3</sup> The trial judge in this case found only that the child was "not capable of communicating to the jury." J.A. 38. He did not find that she was incapable of receiving just impressions of the molestation she had suffered, or of recalling it, or of talking about it in the relaxed setting of a pediatrician's examination and interview.

On the contrary, by ruling the statements were admissible as containing sufficient indicia of reliability the trial court implicitly found the child was in fact capable

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<sup>3</sup> Amicus NACDL pushes the argument still further by repeatedly referring to the child as "mentally incompetent."

of receiving just impressions of the facts. The "incompetence" of the younger daughter went only to her ability to testify before a jury. J.A. 39, 115.

It should also be noted that the Wigmore treatise itself does not support the *per se* rule that unreliability of hearsay necessarily follows incompetence to testify. In the section of the treatise dealing with spontaneous exclamations, Wigmore states:

Does the disqualification of *infancy* exclude declarations otherwise admissible? It would seem not; because the principle of the present exception obviates the usual sources of untrustworthiness in children's testimony; because, furthermore, the orthodox rules for children's testimony are not in themselves meritorious; and, finally, because the oath test, which usually underlies the objection to children's testimony, is wholly inapplicable to them.

6 Wigmore, *Evidence*, § 1751 (Chadbourn rev. 1976) (emphasis in original, citations and footnote omitted).<sup>4</sup>

For further examples of the application of this principle, see *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979) (three-year-old's statements admissible under a spontaneous declaration exception though he "could not have been subjected to cross-examination even if he had been called as a witness by reason of his tender years"); *Jones v. United States*, 231 F.2d 244 (D.C. Cir. 1956) (five-year-old

<sup>4</sup> Indeed, Wigmore argued that efforts to measure *a priori* the degrees of trustworthiness in children's statements were "futile and unprofitable." He recommended the abolishment of all grounds for testimonial incapacity as applied to children. 2 Wigmore, *Evidence*, § 509 (Chadbourn rev. 1979).

incompetent to testify as witness but statements to her mother were admissible as spontaneous declarations); *Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988) (out-of-court statements by four-year-old sexual abuse plaintiff to her psychologist admissible under medical diagnosis or treatment exception to hearsay rule, though plaintiff was incompetent to testify as a witness, where statements were pertinent to plaintiff's treatment and were reasonably relied upon by a psychiatrist in treating plaintiff).

In the present case, the trial court did not have a "firmly rooted" hearsay exception to rely upon. Nevertheless, there were indicia of reliability of the younger daughter's statements. These included: (1) physical evidence corroborating sexual abuse; (2) a lack of motive to fabricate; (3) the nature of the statements themselves; (4) the fact that the younger daughter was in the sole custody of Laura Lee Wright and Robert Giles, her biological parents, at the time the injuries occurred; (5) the older daughter's testimony that it was Wright and Giles who perpetrated the sexual abuse on the younger daughter; and (6) the perpetrators were well known to the victim. J.A. 115. The court concluded that the younger daughter's statements to Dr. Jambura were admissible under Rule 803(24) because their circumstantial guarantees of trustworthiness were equivalent to statements permitted under some of the firmly rooted hearsay exceptions. J.A. 119. This ruling is in keeping with a large body of law throughout the United States, and is a logical extension of the policies espoused by Wigmore and such cases as *Nick*, *Jones*, and *Morgan*.

In *People v. District Court of El Paso County*, 776 P.2d 1083 (Colo. 1989), the trial court found a four-year-old



child was not competent to testify as she was unresponsive to questions in open court and could not state what it meant to tell the truth or to lie. The trial court concluded that the child's statements to a pediatrician were therefore unreliable. The Supreme Court of Colorado rejected the trial court's analysis and adopted, instead, the two-pronged test approved by this Court in *Ohio v. Roberts*, 448 U.S. 56 (1980). First, the court must determine whether the proponent of the hearsay either produced the hearsay declarant for cross-examination or demonstrated that the declarant was unavailable. If the declarant is unavailable to testify, the next issue is whether the hearsay bears sufficient indicia of reliability, precluding the need for cross-examination. The court held that the trial court's order finding the victim not competent to testify rendered her "unavailable." The court went on to state:

By so holding, we promote the rule that a child's out-of-court declaration is not automatically rendered inadmissible merely because the child was found to be not competent at the competency hearing. . . . Rather, the finding that a child is not competent to testify requires the trial court to determine whether the child's hearsay statement is sufficiently reliable to be admitted in spite of the child's unavailability and whether there is corroborative evidence of the act which is the subject of the statement. . . . This rule is a recognition of the fact that children present special problems as witnesses due to their short memories, possible traumatic reaction as victims, and tendency to be intimidated by formal trial settings.

776 P.2d at 1087. In words equally applicable to the present case, the Colorado Supreme Court held:

A competency hearing determines only whether a child can accurately recollect and narrate at trial the events of abuse, . . . not whether the child was competent at the time the hearsay statement was made or whether the statement was reliable. A child's reliable out-of-court statement that accurately relates an incident of abuse will not be barred merely because the child was so frightened by the competency hearing proceedings that he or she became unresponsive or uncommunicative at the hearing. By interpreting the statute in this manner, we reject the logically flawed assumption that a determination of incompetency at the time of the hearing invariably establishes that the child's statement was not reliable. In our view, this determination is to be made by the trial court when deciding whether the child's statement is supported by sufficient safeguards of reliability.

776 P.2d at 1087-1088 (citations and footnote omitted).

The logical framework set forth in *People v. District Court of El Paso County* has been used by other courts in determining whether out-of-court statements by very young children would be admissible despite their inability to testify. See *State v. Superior Court for the County of Pima*, 719 P.2d 283 (Ariz. App. 1986) (proffered statements must be evaluated in the factual context of the particular case to determine whether reliability is sufficiently indicated); *State v. Robinson*, 753 P.2d 801 (Ariz. 1987) (where principles announced in *Roberts* are fully satisfied, it would be a perversion of the confrontation clause to exclude the evidence); *Perez v. State*, 536 So.2d 206 (Fla. 1988) (requirement that the trial court find that the time,

content, and circumstances of the statement provide sufficient safeguards of reliability and furnish sufficient guarantees of trustworthiness of the hearsay statement, obviating the necessity that the child understand the duty of a witness to tell the truth). *See also State v. Lanam*, 444 N.W.2d 882 (Minn. App. 1989) (rev. granted 1989); *State v. Boston*, 545 N.E.2d 1220 (Ohio 1989); *State v. Bounds*, 694 P.2d 566 (Ore. App. 1985); *State v. Doe*, 719 P.2d 554 (Wash. 1986).<sup>5</sup>

In summary, the premise of respondent and NACDL – that an out-of-court statement of a child found incompetent to testify must be held unreliable – is logically flawed, and not in keeping with the spirit of *Ohio v. Roberts*. It is not applied by enlightened courts, and it

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<sup>5</sup> Counsel for Wright cites *State v. Ryan*, 691 P.2d 197 (Wash. 1984), in support of the *per se* rule of inadmissibility. *Ryan* was described as “admittedly confusing” in *State v. Hunt*, 741 P.2d 566 (Wash. App. 1987), because of the imprecise use of the term “incompetency.” The court noted:

The circumstantial guarantees of trustworthiness generally used to analyze the reliability of hearsay statements presuppose, in most instances, that the hearsay declarant possessed a certain degree of mental capacity throughout the relevant time period. If the requisite mental capacity is lacking, the time, manner, and circumstances of the making of the statement may well be irrelevant to a determination of reliability.

741 P.2d at 569. *Ryan* was clarified by *Doe, supra*, which indicated that the reliability of an unavailable child’s statements may be indicated by spontaneity, by recitation of acts generally unknown to children, or by surrounding circumstances.

should not be adopted as an adjunct to the right of confrontation.

### III.

#### A PEDIATRICIAN’S INTERVIEW OF A CHILD SEXUAL ABUSE VICTIM IS NOT ANALOGOUS TO EYE-WITNESS IDENTIFICATION AT A PRETRIAL LINEUP OR TO HYPNOTICALLY REFRESHED TESTIMONY

##### A. The Out-of-court Statements of a Child Sexual Abuse Victim Are Not Analogous to Custodial Pre-trial Identifications.

Amicus curiae ACLU asserts that interviews with child sex abuse victims are so fraught with “pitfalls and hazards,” ACLU Br. p.23, that “additional protections are required to make the right to confrontation meaningful.” ACLU Br. p.21. The necessary protection urged by the ACLU is a prophylactic rule that all interviews with such victims be recorded if hearsay stemming from such interviews is to be admissible at trial.<sup>6</sup> The ACLU proposes that the absence of a videotape should constitute an absolute bar to admissibility of the child’s out-of-court statement “notwithstanding the existence of a residual hearsay exception, without the necessity of a case-by-case

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<sup>6</sup> The nature of the “recording” required by the proposed prophylactic rule is not clear. On the one hand, a rule of exclusion is triggered whenever prosecutorial authorities interview a child and “do not *audio or videotape* the interview.” ACLU Br. p.27 (emphasis added). On the other hand, a footnote on the same page of the ACLU brief endorses “the use of *videotape* in this context as a prophylactic rule.” ACLU Br. p.27, n.37.

analysis under the Confrontation Clause." ACLU Br. p. 21.<sup>7</sup>

In this way, the argument goes, the rights of the accused will be preserved because the defendant will have a more effective way of challenging the hearsay statement. At the same time, "undesirable prosecutorial behavior" will be reduced because "prosecutors will not be able to badger children into making highly questionable statements." ACLU Br. p.28.<sup>8</sup>

Much of the support for the ACLU's proposed *per se* rule of exclusion is premised upon *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967). In *Wade-Gilbert* each accused was faced with a pretrial lineup after he had been arrested, was in custody and had had counsel appointed. This Court held that conducting a lineup in the absence of counsel resulted in the defendant's Sixth Amendment right to counsel being impinged upon in a "critical stage" of the criminal proceeding. The Court mandated that when a lineup has been conducted without counsel an in-court identification is admissible only if it can be shown that an independent basis exists for the identification. The ACLU argues that

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<sup>7</sup> The ACLU makes no differentiation between types of cases, ages of victims, or qualifications of persons conducting the interview, except to lump all interviewers into one category as "prosecutorial authorities." ACLU Br. p.27.

<sup>8</sup> The ACLU marshals support for its theory of such misconduct by supplying the court with references to three newspaper articles from a four-and-one-half year period dealing with allegedly false accusations. Hence, false accusations are "not uncommon." ACLU Br. p.23.

the *Wade-Gilbert* rule is needed in situations "when the risk of erroneous convictions is high" because "a realistic assessment of the propensities of the police" to engage in "improper suggestion" frequently leads to "mistakes in identification" and deprives the accused of any meaningful examination of the witness at trial. ACLU Br. pp.20-21. The ACLU submits that the eyewitness identification at a pre-trial lineup is "not unlike" the "defendant's situation when he is accused of sexual abuse in an out-of-court statement by a young child. . . ." ACLU Br. p.21.

The State of Idaho submits that the analogy drawn by the ACLU is flawed. Moreover, the application of the proposed rule is impractical and unworkable.

This Court has recognized that there is a fundamental difference between evidence gathering and the interviewing of witnesses on the one hand and placing the defendant in a confrontational position with the state on the other.

None of the classical analyses . . . suggests that counsel must be present when the prosecution is interrogating witnesses in the defendant's absence even when, as here, the defendant is under arrest; counsel is rather to be provided to prevent the defendant himself from falling into traps devised by a lawyer on the other side and to see to it that all available defenses are proffered.

*United States v. Ash*, 413 U.S. 300, 316-317 (1973), quoting *United States v. Bennett*, 409 F.2d 888, 899-900 (2nd Cir. 1969).

The *Ash* Court stated that the *Wade-Gilbert* rule would not be expanded to non-confrontational settings (in that



case, identification of a defendant through the use of a photo-lineup) and that "[i]f accurate reconstruction is possible, the risks inherent in any confrontation still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be 'critical.'" 413 U.S. at 316.

Because the interview of a child witness does not contain any element of confrontation between any representative of the state and the defendant, *Wade-Gilbert* is not helpful.<sup>9</sup>

Nevertheless, the ACLU's argument goes, *Wade-Gilbert* dealt with a situation which made it very difficult for an accused to defend against an identification which could be false but which the defendant had no way of guarding against or responding to. Hence, special safeguards were required. Because of the possibility of false accusation or confabulation, similar safeguards should be grafted onto child interviews.

The State of Idaho submits that this is precisely why the *Ash* Court stressed that scientific precision is not the test for requiring the presence of counsel and that the safeguard against abuses begins with the ethical responsibility of the prosecutor and continues with the

<sup>9</sup> It should be further noted that not only did the younger daughter's interview with Dr. Jambura not involve an element of confrontation with Wright, the girl did not implicate Laura Lee Wright in any criminal activity. Only Bobby Giles was the subject of Dr. Jambura's allegedly improper questioning and the girl's spontaneous identification ("Daddy does this with me, but he does it a lot more with my sister than with me." J.A. 123).

capability of the court to review the matter under due process standards. 413 U.S. at 320.<sup>10</sup>

The demand for indicia of reliability of *Ohio v. Roberts* is exactly the type of review process contemplated. It is the duty of the court to look at all of the circumstances in order to determine whether the child's statements will go to the jury. If insufficient corroborating factors exist, the court will not allow the use of the child's hearsay. This is similar to the role of the trial court as described in *Wade*. There, the Court set forth the duty of the trial court to determine whether or not to allow a witness to testify as to identification from a source independent from an uncounseled lineup. The application by the court of the analysis required by *Wong Sun v. United States*, 371 U.S. 471 (1963), is simply a recognition that a judge will have to look at indicia of reliability in making an evidentiary determination.

The inflexibility of the *per se* rule in *Wade-Gilbert* was identified by Justice Rehnquist in his concurring opinion in *Moore v. Illinois*, 434 U.S. 220 (1977):

I believe the time will come when the Court will have to re-evaluate and reconsider the *Wade-Gilbert* rule. . . . The rule was established to ensure the accuracy and reliability of pretrial identifications and the Court will have to decide

<sup>10</sup> The ACLU also fails to recognize that professionals such as pediatricians and psychologists who interview children also have high standards to adhere to. To suggest that such interviewers would abandon their duty to a child or would function merely as a "prosecutorial agent," ACLU Br. p.21, or "an investigator for the police," ACLU Br. p.4, is overreaching in the extreme.

whether a *per se* exclusionary rule should still apply or whether *Wade-Gilbert* violations, like other questions involving the reliability of pre-trial identification, would be judged under the totality of the circumstances.

434 U.S. at 233.

Finally, the *per se* rule submitted by the ACLU is not reasonable. The experience of an urban attorney may well be that "[i]n 1990, it is highly unlikely that recording equipment will not be available" whenever a child sexual abuse victim is interviewed by the police or by someone who is arguably an "agent" of the police. ACLU Br. p.27, n.37. The reality, outside the major metropolitan corridors, is more accurately portrayed by Chief Justice Bakes in his dissent in *Wright*:

Family doctors do not normally film their examinations of young patients; most probably do not have video cameras in their examining rooms. Furthermore, many rural communities do not have the financial means to set up extensive videotape facilities to aid in the preparation of criminal cases. Until today, there were no such requirements under either state or federal law.

775 P.2d at 1232.

It is also highly questionable that the problem of "confabulation" will be solved by recordation. In most cases, the child will be interviewed by a professional seeking to determine what happened to the child. It is unlikely that the person interviewing the child will have a reason to lead a child to confabulate. If there is confabulation, it will most likely have occurred before the interview, and a recordation, by respondent's own admission,

would not show that fact.<sup>11</sup> The *per se* rule also allows for no good faith exception. Considering that recording devices do not always work, and that audio and videotapes are relatively easy to ruin, this rule would mean the release of defendants on highly questionable grounds without a corresponding societal benefit.

**B. The Out-of-court Statements of a Child Sexual Abuse Victim Are Not Analogous to Hypnotically Refreshed Testimony.**

Amicus curiae ACLU finally asserts that the unrecorded interview statements of a child sexual abuse victim present "an analogous situation," ACLU Br. p.26, to that of a witness whose testimony has been hypnotically enhanced. According to the ACLU, the child victim, like the hypnotized individual, "becomes subject to suggestion, is likely to confabulate, and experiences artificially increased confidence in both true and false memories following hypnosis." *Rock v. Arkansas*, 483 U.S. 44, 62 (1987) (Rehnquist, C.J., dissenting).

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<sup>11</sup> It must be borne in mind that the younger daughter was never placed into a position where she could have confabulated the statements to Dr. Jambura. She had no contact with Louis Wright, his girlfriend Cynthia Goodman, or her five-and-one-half-year-old half-sister in the day between removal from her home and the interview with Dr. Jambura. Nor does it appear that anyone she contacted had a motive to attempt such a tactic. The suggestions of an ugly custody dispute between Louis and Laura Lee Wright have no application to the younger daughter. Her natural parents were Wright and Giles, who had sole custody of her at all times pertinent to this case.

This Court's opinion in *Rock* is not only distinguishable from the present case; it actually stands for the opposite of the position advocated here by the ACLU.

First, the *Rock* case did not implicate the defendant's right under the Confrontation Clause of the Sixth Amendment to confront an accuser. Instead, it involved the right of the defendant to testify on her own behalf. The Court located that right in the Fourteenth Amendment's deprivation of liberty clause, the Sixth Amendment's compulsory process clause, and the Fifth Amendment's privilege against self-incrimination.

More importantly, the *Rock* case provides no support for the *per se* exclusionary rule advocated by the ACLU in this case. On the contrary, *Rock* overturned precisely such a rule enacted by the State of Arkansas largely because such a rule:

does not allow a trial court to consider whether posthypnosis testimony may be admissible in a particular case; it is a *per se* rule prohibiting the admission at trial of any defendant's hypnotically refreshed testimony on the ground that such testimony is always unreliable.

*Id.* at 56 (footnote omitted).

The majority found the *per se* rule unconstitutional even though it recognized that "the use of hypnosis in criminal investigations . . . is controversial, and the current medical and legal view of its appropriate role is unsettled." *Id.* at 59.<sup>12</sup>

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<sup>12</sup> The dissenters in *Rock* would have deferred to and sustained the Arkansas *per se* exclusionary rule as a reasonable

(Continued on following page)

The Court held that the cure was not to bar all hypnotically enhanced testimony, but rather to rely upon the "traditional means of assessing accuracy of testimony." *Rock*, 483 U.S. at 61. In particular, the Court pointed to the availability of "corroborating evidence" (a defective gun in the *Rock* case) to verify the accuracy of the information recalled as the result of hypnosis. *Id.* This approach of relying on the trial court to test the admissibility of the out-of-court interview statements of a child sexual abuse victim by looking to the totality of the circumstances and all corroborating evidence surrounding the statement and the events is precisely the approach suggested by the petitioner in this case. It is the only

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(Continued from previous page)

response to the fact that the scientific understanding of hypnotically refreshed testimony is still in its infancy. *Id.* at 65. There is, of course, no question that the Idaho Supreme Court has the right to impose on its own lower courts a prophylactic rule requiring audio or videotaping of out-of-court statements of child sexual abuse victims. The dissenters in *Giles*, in fact, endorsed Model Rule of Evidence 807, which contains precisely such a requirement. See *Giles*, 115 Idaho at 995, 772 P.2d at 202. The question here is whether the *Giles* dissenters, when they became the *Wright* majority, could constitutionalize this provision of Model Rule 807 as the minimum required by the Confrontation Clause of the Sixth Amendment to the United States Constitution.



approach that comports with the mandates of *Ohio v. Roberts*.

Respectfully submitted,

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR  
THE COUNTY OF CANYON

THE STATE OF IDAHO,	)	ORDER ON
Plaintiff,	)	DEFENDANT's
-vs-	)	AMENDED
PAMELA RAE SANTIAGO,	)	MOTION TO
Defendant.	)	SUPPRESS
	)	EVIDENCE
	)	Case No.
	)	CR-89-09065
	)	(Filed
	)	March 8, 1990)

On January 30, 1990, the defendant, **Pamela Rae Santiago**, filed an **Amended Motion to Suppress**. In said motion, the defendant requested the suppression of all hearsay statements of the victim, Desiree Wight, regarding the alleged sexual abuse by the defendant. The motion is based upon constitutional grounds.

On March 5 and 6, 1990, this Court heard testimony and argument regarding the defendant's motion. This Court also reviewed the briefs and affidavits filed by the parties regarding such motion.

Carol Griffiths' Video Tape

This Court was asked to suppress the video taped interview by Carol Griffiths of Desiree Wight, the alleged victim. The video tape was admitted for the purpose of the motion as State's Exhibit 2. This Court finds that the video tape of the victim made by Carol Griffiths, an

investigator for the Boise Police Department, is admissible. Said tape is admissible since it meets the requirements set forth in *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), concerning the video taping of an interview with a child. This Court further finds that during that interview, Desiree Wight was not subjected to leading questions or coaching, but answered questions fairly put to her. For these reasons the motion to suppress State's Exhibit 2 is **DENIED**.

\* \* \*

The victim's statements to Jan Hindman.

At the request of the prosecuting attorney, Desiree Wight was interviewed by Jan Hindman, a mental health therapist specializing in sexual abuse. Jan Hindman interviewed Desiree Wight on four different occasions. No video or audio recording was made of the interviews. This Court finds that any hearsay statements made by Desiree Wight during such interviews is inadmissible since they were not audio taped or video taped as required by *State v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989). Based upon the authority of *State v. Wright*, this Court finds that Hindman's proposed testimony lacks sufficient guarantees of trustworthiness needed to overcome the defendant's right to confront the defendant's accuser. Therefore, the defendant's motion to suppress the statements made by the victim to Jan Hindman is **GRANTED**.

Dated this 8th day of March, 1990.

Gerald L. Weston  
Gerald L. Weston  
 District Judge

In the companion case of *State v. Steve G. Santiago*, Case No. CR-89-09066, the district court entered an order identical to the order issued in *State v. Pamela Rae Santiago*, Case No. CR-89-09065.

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IN THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR  
THE COUNTY OF TWIN FALLS

THE STATE OF IDAHO,	)	Case No. 6850
Plaintiff,	)	
vs.	)	MEMORANDUM
GREGORY OLIVEIRA,	)	DECISION
Defendant.	)	

Defendant's Motion *in Limine*. Granted.

K. Ellen Baxter, Prosecuting Attorney for Twin Falls County, for plaintiff.

Michael Wood, Public Defender for Twin Falls County, for defendant.

# I. FACTS

On January 30, 1989, defendant, Gregory Oliveira, was charged with one count of Lewd and Lascivious Conduct with his daughter, Tina Oliveira. After a preliminary hearing, the defendant was bound over to District Court. On June 16, 1989, the State filed a notice of intent to produce hearsay testimony, pursuant to I.R.E. 803(24) and I.C. Sec. 19-3024. The defendant then filed a motion *in limine* seeking to exclude the hearsay statements. A four day hearing was held on the the [sic] motion which included extensive testimony and evidence.

During the hearing, Kathy Oliveira, Tina's mother, testified that she left her three year old daughter in the care of her husband, the defendant, for nearly one and one half hours on the afternoon of January 20, 1989.

Kathy returned home from her shopping trip sometime between 5:00 p.m. and 5:30 p.m. Upon returning, she noticed nothing unusual about Tina's behavior. Tina was sitting on the floor watching television. Kathy then cooked dinner. After an argument with Kathy over burning the pizza, the defendant ate his dinner and retired to the couch where he fell asleep. Meanwhile, Kathy watched television while Tina played with her cat and toy phone.

At approximately 9:00 p.m., Tina approached Kathy with her hand on her crotch at which time essentially the following conversation occurred:

Tina: "I hurt."

Kathy: "Where do you hurt?"

Tina: "Right here, momma." (and rubbed her vaginal area with her hand.)

Kathy: "Why do you hurt there?"

Tina: "Daddy licked me."

Kathy: "No, honey, you mean daddy tickled you."

Tina: "No, momma, daddy licked me." (and made a licking motion with her mouth and tongue)  
"And I licked him."

Kathy then pulled Tina's pants down to investigate but did not see anything unusual. Tina continued to complain that her crotch itched and was sore. Kathy then attempted to call her aunt, Linda Helmer, about the incident, but there was no answer.



After the defendant awoke, Kathy confronted him about Tina's complaint. Defendant denied the accusations. Kathy made a second attempt to contact Helmer and was successful. Kathy, Tina and the defendant then went to Helmer's home. Kathy asked Helmer to speak with Tina. Helmer took Tina into the bedroom where essentially the following conversation occurred:

Linda: (Gidget, a pet, was on the bed. Tina asked about Cuddles, another pet, and I told her Cuddles was downstairs.)

Linda: "Did your mom go to the store?"

Tina: "For pizza and pepsi."

Linda: "Who watched you?"

Tina: "Daddy."

Linda: "What did you guys do?"

Tina: "He licked me."

Linda: "You mean he spanked you?"

Tina: "No, he licked me." (She made the motion with her tongue and put her hand between her legs.)

After leaving the bedroom, Helmer and Tina went to the kitchen with Kathy and the defendant. Helmer's husband, Gordon, was seated in the kitchen at the time. Kathy then took Tina to the sink where Tina spontaneously said, "Daddy licked me down there." Tina then touched her crotch. At this point, Helmer said, "If you did this, you better get some help."

pp. 1-3.

\* \* \*

On January 29, 1989, Kathy took Tina to see a pediatrician, Dr. Barton Adrian. At his office, Dr. Adrian, who specializes in interviewing and treating abused children, conducted an untaped interview of Tina with Kathy present. Dr. Adrian asked various preliminary questions gauged to assess Tina's ability to communicate. After doing this, Tina was shown anatomical figures. One of the figures was that of an unclothed female. As Dr. Adrian pointed to an eye on the drawing, Tina pointed to her eye. This procedure continued until Dr. Adrian pointed to the vulva. Tina then said, "Daddy licked me." When asked what that means, Tina stuck her tongue out. Dr. Adrian then showed Tina an anatomical picture of a male. As Dr. Adrian pointed to the penis, Tina said, "I licked him."

p. 5.

\* \* \*

B. Tina's Statement to her Aunt, Linda Helmer, made on January 20, 1989 at the Helmer home.

The State first seeks to introduce Tina's January 20, 1989 statements made to her aunt, Linda Helmer, under the catch-all exception of I.R.E. 803(24). The Idaho Supreme Court in *State v. Hester*, 114 Idaho 688, 760 P.2d 27 (1988) held that:

To be admissible under I.R.E. 803(24), the court must determine that (A) the statement has circumstantial guarantees of trustworthiness equivalent to those in Rules 803(1) to 803(23),

(B) the statement is offered as evidence of a material fact, (C) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (D) the general purpose of the rules of evidence, and the interests of justice, will best be served by admission of the statement into evidence. Further, (E) a statement may not be admitted under I.R.E. 804(24) unless its proponent gives the adverse party adequate notice and information regarding use of the statement.

*Id.* at 697.

In interpreting 803(24), the court in *State v. Wright*, 89 I.S.C.R. 831 (June 13, 1989) found that statements made to a doctor in a sex abuse case did not meet this trustworthiness standard. The court stated:

The Wright girl's declarations are not trustworthy because of Dr. Jambura's interview technique: the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and, blatantly leading questions were used in the interrogation. Further, the statements lack trustworthiness because this interrogation was performed by someone with a preconceived idea of what the child should be disclosing. Because of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura, we conclude that Dr. Jambura's testimony regarding the younger Wright girl's declarations lacked the particularized guarantees of trustworthiness necessary to satisfy the requirements of the Confrontation Clause.

*Id.* at 835.

Here, Tina's statements to her Aunt, Linda Helmer, were derived from an interview. Tina was taken by her mother to the Helmer residence for the purpose of having Helmer question Tina about her statements concerning the alleged sexual contact with her father, the defendant. Kathy Oliveira asked Helmer to interview Tina about the incident. Because these statements were made in the context of an interview, the requirements of *Wright* apply.

Based on the Supreme Court's holding in *Wright*, statements made by a child witness during an interview and sought to be introduced under Rule 803(24), in addition to the requirements under *Hester*, can only be introduced if, 1) the interview is recorded on videotape, 2) that blatantly leading questions are not used, and 3) that the interrogation was not performed by someone with preconceived ideas or biases.<sup>1</sup>

The interview with Helmer was not videotaped and this court, therefore, feels constrained under *Wright* and Justice Huntley's concurrence in *Giles* to rule that Tina's statements to her Aunt, Linda Helmer, made on January 20, 1989, at the Helmer home are inadmissible hearsay and do not qualify for admission under I.R.E. 803(24).

pp. 11-13.

<sup>1</sup> See also, the concurring opinion of Justice Huntley in *State v. Giles*, 89 I.S.C.R. 373 (1989) where he states,

*At a minimum, the sessions (interviews of child witnesses in child abuse cases) should be videotaped and the examiner should not be permitted to use leading, suggestive and "closed-ended" questions.*

*Id.* at 378 (emphasis added).

\* \* \*

6. Tina's statements to Dr. Adrian during the interview on January 27, 1989.

The State seeks to introduce Tina's statements to Dr. Adrian as statements made for the purpose of medical diagnosis pursuant to I.R.E. 803(4). This hearsay exception reads, "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the course thereof insofar as reasonably pertinent to diagnosis or treatment." *Id.* In the present case, Tina's statements were not made for the purpose of medical diagnosis or treatment. Rather, Tina's statements to Dr. Adrian were made solely as part of the State's criminal investigation and in anticipation of litigation.

p. 20.

\* \* \*

The State also intimates that the statements made to Dr. Adrian could be admitted under 803(24).<sup>1</sup> Under this exception, a video taped interview is required. *State v. Wright, supra.* Dr. Adrian's interview was not videotaped. Therefore, it cannot be admitted under Rule 803(24).

p. 23.

\* \* \*

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<sup>1</sup> See, e.g., discussion of I.R.E. 803(24) under heading B, page [sic] 11-13 [Appendix pages 7-9].

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(6)  
No. 89-260

Supreme Court, U.S.

FILED

MAR 2 1990

JOHN R. DANIEL, JR.  
CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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STATE OF IDAHO, PETITIONER

v.

LAURA LEE WRIGHT

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

---

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

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# **QUESTION PRESENTED**

Whether an out-of-court statement by respondent's child that she had been sexually abused had the particularized guarantees of trustworthiness needed to justify its admission under the Confrontation Clause.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1988

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No. 89-260

STATE OF IDAHO, PETITIONER

v.

LAURA LEE WRIGHT

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*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO*

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**BRIEF FOR THE UNITED STATES  
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**INTEREST OF THE UNITED STATES**

The question presented is whether an out-of-court statement by a child that she had been sexually abused—had the particularized guarantees of trustworthiness needed to justify its admission under the Confrontation Clause. The United States prosecutes many cases involving child abuse because of its prosecutorial responsibilities with respect to the District of Columbia, federal territories, and the military. See also 18 U.S.C. 2243. As this Court has recognized, “[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). In many cases, the victim is either too young or too frightened to testify in a courtroom setting, or would experience traumatic effects from doing so. Thus, the admissibility of a child’s statement describing sexual abuse is often a critical factor in determining whether an



abuser is prosecuted and convicted. For that reason, the United States has a significant interest in the resolution of the Confrontation Clause issue presented in this case.

#### STATEMENT

1. In 1982, respondent separated from her husband, Louis Wright. They informally agreed that each parent would have custody of their one-year-old daughter during consecutive six-month periods. In April 1984, respondent had a second daughter, fathered by Robert Giles, with whom respondent was then living. On October 7, 1986, pursuant to her arrangement with Wright, respondent took custody of her older daughter. Pet. App. 24.

On November 8, 1986, respondent's older daughter revealed to Cynthia Goodman, Louis Wright's girlfriend, that her mother and Giles had sexually abused her and her sister. The next day, Goodman reported that statement to the police. Three doctors examined the older daughter that day and found evidence of sexual abuse. One of the examining physicians was Dr. John Jambura, a pediatrician with extensive experience in child abuse cases. Pet. App. 24-25, 59.

On the same day, a police officer and social worker took the younger daughter into custody. Dr. Jambura examined her the following day. At the time, the younger daughter was two-and-one-half years old. In the course of his examination of the younger daughter, Dr. Jambura found conditions "strongly suggestive of sexual abuse with vagina contact." He further believed that the trauma he had observed in the vaginal area had occurred "approximately two to three days prior to the examination." Pet. App. 25, 55-58.

In the course of the examination, Dr. Jambura conversed with the younger child. He began with "chitchat," asking her questions such as what she had for breakfast. The child answered in a "relaxed" and "animated" fashion. Dr. Jambura then turned to her domestic life, asking her "how are things at home." After moving to that topic, he asked four specific questions: "Do you play with daddy? Does daddy play with you?

Does daddy touch you with his pee-pee? Do you touch his pee-pee?" Dr. Jambura established that "pee-pee" generally connoted the genital area. Pet. App. 60-62.

At trial, Dr. Jambura testified, on direct examination by the State, that the child answered as follows:

Q. [W]hat was, as best you recollect, what was her response to the question "Do you play with daddy?"

A. Yes, we play—I remember her making a comment about yes we play a lot and expanding on that and talking about spending time with daddy.

Q. And "Does daddy play with you?" Was there any response?

A. She responded to that as well, that they played together in a variety of circumstances and, you know, seemed very unaffected by the question.

Q. And then what did you say and her response?

A. When I asked her "Does daddy touch you with his pee-pee," she did admit to that. When I asked, "Do you touch his pee-pee," she did not have any response.

Q. Excuse me. Did you notice any change in her affect or attitude in that line of questioning?

A. Yes.

Q. What did you observe?

A. She would not—oh, she did not talk any further about that. She would not elucidate what exactly—what kind of touching was taking place, or how it was happening. She did, however, say that daddy does do this with me, but he does it a lot more with my sister than with me.

Q. And how did she offer that last statement? Was that in response to a question or was that just a volunteered statement?

A. That was a volunteered statement as I sat and waited for her to respond, again after she sort of clammed-up, and that was the next statement that she made after just allowing some silence to occur.

Pet. App. 61-62; J.A. 122-123.

2. In May 1987, respondent and Giles were tried jointly before a jury on two counts of lewd conduct with a minor under

16, in violation of Idaho Code § 18-1508 (1987). At the time of trial, the younger daughter was three. Following a voir dire examination of the child, both respondent's counsel and the State agreed that the child was not competent to testify, as she was unable to communicate in a trial setting. Pet. App. 3, 27, 29; J.A. 32-39. The older child, who was six at the time, did testify. She stated that Giles had had intercourse with her sister, while respondent had held the younger child's legs and covered her mouth so she would not scream. Pet. App. 24 n.1; J.A. 61.

Dr. Jambura testified about his examinations of the two girls. Over the objections of respondent and Giles, the trial court permitted Dr. Jambura to testify about his conversation with the younger child during the examination. Pet. App. 3-4, 25-27; J.A. 108. The trial court found this evidence admissible under Idaho's residual hearsay exception, Idaho R. Evid. 803(24).<sup>1</sup> Pet. App. 20-31; J.A. 112-115. The jury convicted respondent and Giles on both counts, and respondent appealed.<sup>2</sup>

3. The Idaho Supreme Court reversed respondent's conviction on the count regarding the younger daughter. The court held that the admission of the child's hearsay statements violated respondent's confrontation rights.

The court began by stating that statements that fit within a "well-established exception" to the hearsay rule are generally admissible under the Confrontation Clause. Evidence admitted pursuant to the "catch-all" provision of Idaho R. Evid. 803(24), however, "should be considered 'presumptively unreliable and inadmissible for Confrontation Clause purposes' absent a 'showing of particularized guarantee of trustworthiness.'" Pet. App. 7. Applying those principles, the court concluded that the statements made to Dr. Jambura lacked the particularized guarantees needed to satisfy the Confrontation Clause. *Id.* at 8-17.

<sup>1</sup> The Idaho residual exception is essentially identical to Fed. R. Evid. 803(24).

<sup>2</sup> Giles also appealed, claiming that the admission of the younger child's hearsay statements violated Idaho R. Evid. 803(24). Pet. App. 27. The Idaho Supreme Court affirmed, holding that the trial court had properly applied that hearsay exception. *State v. Giles*, 115 Idaho 984, 772 P.2d 191 (1989) (reproduced at Pet. App. 23-54). Giles did not raise a Confrontation Clause claim. Pet. App. 32.

First, the court found Dr. Jambura's "interview technique" to be unduly suggestive because he had used "blatantly leading questions." Second, the court stated that Dr. Jambura had come to the interview "with a preconceived idea of what the child should be disclosing." Finally, the court found the interview to be "inadequately reviewable" because "the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial." Pet. App. 8. The court evaluated those factors in light of the child's "tender years," and theories of developmental psychology that regard the memories of young children as especially sensitive to suggestion. *Id.* at 8-15. Against that background, the court found that the daughter's statements were "fraught with the dangers of unreliability which the Confrontation Clause is designed to highlight and obviate." *Id.* at 17.

#### SUMMARY OF ARGUMENT

The Confrontation Clause protects a defendant's right to cross-examine witnesses against him. It does not, however, bar the admission of every hearsay statement. The question whether confrontation is required for a particular hearsay statement focuses on the declarant's unavailability and the reliability of the out-of-court statement. When a statement falls within a firmly rooted hearsay exception, reliability concerns are satisfied without more. Even if no such exception applies, reliability can be established if the statement is shown to have "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

A. A statement not falling within a firmly rooted hearsay exception may be admitted if a court finds from the surrounding circumstances that the statement is sufficiently trustworthy and that it is unlikely that cross-examination of the declarant would significantly undermine the statement's reliability.

In admitting the statements of respondent's younger daughter, the trial court in this case focused on the strong corroborative evidence for the statements, the absence of a motive



to lie, the implausibility that a young child could have invented the statements, and other factors. The trial court's analysis supports the conclusion that sufficient "particularized guarantees of trustworthiness" were present to satisfy the Confrontation Clause. Moreover, it is difficult to imagine what respondent could have hoped to establish through cross-examination of her three-year-old daughter. Even if on cross-examination respondent had managed to get the girl to disown her earlier statements, those statements, which were made to a medical professional shortly after the events occurred, would have lost little of their impact and would have remained reliable and trustworthy evidence against respondent.

The Idaho Supreme Court erred by setting forth general rules for the interviewing process that it believed had to be met before a child's out-of-court statements could satisfy the Confrontation Clause. In addition, the court erroneously focused on the veracity and accuracy of Dr. Jambura's trial testimony, rather than on the statements that were admitted through Dr. Jambura's testimony. The Confrontation Clause requires an inquiry into the reliability of the hearsay statements themselves; that inquiry does not turn on the reliability of the witness who relates those statements.

B. In determining whether a statement has the required guarantees of reliability, courts have considered as one factor the resemblance between the statement and any traditional hearsay exceptions. Here, the hearsay exception for statements "made for purposes of medical diagnosis or treatment" furnishes support for admitting the statements of respondent's daughter over the Confrontation Clause objection. The hearsay rules have long recognized an exception for statements made for purposes of medical treatment. The exception recognizes that patients have a powerful motive to speak truthfully to their physicians in order to secure proper medical attention. The medical exception has supported the admission of hearsay statements in many federal cases involving sexual abuse of children.

The admission of hearsay statements made for purposes of medical treatment does not infringe a defendant's rights under the Confrontation Clause. The unavailability of the declarant

need not be shown because statements made to doctors derive much of their reliability from the context in which they were made. In addition, such statements possess the required indicia of reliability because they fall within a firmly rooted hearsay exception. For that reason, the courts of appeals have ruled that when statements are admitted under the medical exception to the hearsay rule, the Confrontation Clause is satisfied without more.

In this case, the State offered the medical exception as one basis for admitting the statements of respondent's daughter and made a showing in the trial court to establish the foundation for applying that exception. The trial court, however, did not rely on that ground, instead admitting the statements under the residual hearsay exception. The hearsay question, of course, is not before this Court. Nonetheless, the resemblance between the context of the statements here and the context required for the medical exception is relevant. Even if not precisely within the medical exception, the statements in this case have some of the same assurances of reliability that underlie the medical exception. That consideration strengthens the conclusion that particularized guarantees of trustworthiness are present.

#### ARGUMENT

#### THE IDAHO SUPREME COURT ERRED IN HOLDING THAT THE ADMISSION OF THE OUT-OF-COURT STATEMENTS OF RESPONDENT'S DAUGHTER VIOLATED THE CONFRONTATION CLAUSE

Although this Court has not fully explicated the relationship between the Confrontation Clause and the hearsay rules, a basic approach has emerged. The Confrontation Clause protects the right of a defendant in a criminal trial to cross-examine witnesses against him. *Cruz v. New York*, 481 U.S. 186, 189 (1987). The Court has long recognized, however, that the Confrontation Clause does not bar the admission of every hearsay statement. *Mattox v. United States*, 156 U.S. 237 (1895); *Bourjaily v. United States*, 483 U.S. 171, 182 (1987). Because the exclusion



of all hearsay would work "extreme" and "unintended" results, *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), this Court has sought to reconcile the competing interests in admitting probative evidence in criminal trials and in safeguarding the defendant's right to challenge the reliability of statements through cross-examination. *Bourjaily*, 483 U.S. at 182. Cf. *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988).<sup>3</sup>

The initial step is to determine whether the declarant must be shown to be unavailable before the hearsay statement will be admitted. *United States v. Inadi*, 475 U.S. 387, 394-400 (1986) (unavailability not required for co-conspirator statements); *Roberts*, 448 U.S. at 65 & n.7. The second step is whether the out-of-court statement has sufficient "indicia of reliability" to justify its admission without cross-examination of the declarant. *Bourjaily*, 483 U.S. at 182. Because the "hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California v. Green*, 399 U.S. 149, 155 (1970), no further inquiry into a statement's reliability is required "when the evidence 'falls within a firmly rooted hearsay exception.'" *Bourjaily*, 483 U.S. at 183; *Roberts*, 448 U.S. at 66. When a firmly rooted hearsay exception does not apply, reliability concerns can be satisfied if there are reasons suggesting that the statement is unusually likely to be trustworthy. *Dutton v. Evans*, 400 U.S. 74 (1970); *Lee v. Illinois*, 476 U.S. 530, 543

<sup>3</sup> For confrontation purposes, the Court has accepted, as a point of departure, "McCormick's definition of hearsay as 'testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter.'" E. Cleary, *McCormick on Evidence* § 246, p. 584 (2d ed. 1972). *Lee v. Illinois*, 476 U.S. 530, 543 n.4. (1986). See Fed. R. Evid. 801(c). Admission of out-of-court statements for nonhearsay purposes "raises no Confrontation Clause concerns." *Tennessee v. Street*, 471 U.S. 409, 414 (1985).

The issue in this case is not related to the issue in *Coy v. Iowa*, *supra*. There, the Court held that a defendant has a right under the Confrontation Clause to "confront" face-to-face the witness giving evidence against him at trial. The issue in this case is the quite different Confrontation Clause issue of whether particular out-of-court statements can be admitted without the declarant taking the stand at all.

(1986). Those principles comport with the recognition that "[t]he right to cross-examination, protected by the Confrontation Clause, \* \* \* is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987).<sup>4</sup>

**A. The Court Below Erred In Analyzing Whether The Hearsay Statements Made by Respondent's Daughter Had Particularized Guarantees Of Trustworthiness**

Although this Court has made clear that a statement falling outside a firmly rooted hearsay exception may still be admitted if it has "particularized guarantees of trustworthiness," *Ohio v. Roberts*, 448 U.S. at 66, the Court has not articulated the factors governing the application of that principle in a particular case. In our view, the Idaho Supreme Court erred in formulating a standard that emphasizes rigid procedural rules in the interviewing process, as opposed to considering the entire factual mosaic surrounding the out-of-court statement and the practical value of cross-examination.

1. *A court should determine the trustworthiness of a statement from all the surrounding circumstances, and should consider whether cross-examination would have practical value in testing the statement's reliability*

This Court in *Dutton v. Evans* rejected a Confrontation Clause challenge to the admission of an out-of-court statement that was not within a well-settled hearsay exception. In *Dutton*, respondent Evans was tried for murder. A cellmate of Evans' accomplice testified that the accomplice had said, "If it hadn't been for that dirty son-of-a-bitch Alex Evans, we wouldn't be in

<sup>4</sup> The Court has also indicated that no inquiry into "indicia of reliability" is required "when a hearsay declarant is present at trial and subject to unrestricted cross-examination." *United States v. Owens*, 484 U.S. 554, 560 (1988).

this now." 400 U.S. at 77.<sup>5</sup> A plurality of the Court concluded that the statement was sufficiently reliable to be admitted against Evans, despite the absence of an opportunity for cross-examination of the accomplice. The plurality pointed to several factors that supported the reliability of the statement: first, it did not expressly make an assertion of past fact; second, the introduction of other evidence established that the accomplice was in a position to know about Evans' role in the crime; third, it was unlikely that the accomplice's statement was based on faulty memory; and, fourth, the circumstances of the statement supported its truth, in that there was no apparent motive for the accomplice to lie, the statement was spontaneous, and it was a declaration against penal interest. *Id.* at 88-89.<sup>6</sup>

More important than the particular factors described in *Dutton* was the plurality's rationale. The plurality observed that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" 400 U.S. at 89 (quoting *California v. Green*, 399 U.S. at 161). In light of that concern, the Confrontation Clause was not violated, because the possibility that Evans could have undercut the statement's reliability through cross-examination was "unreal." 400 U.S. at 89.

In *Lee v. Illinois*, the Court again recognized that hearsay not covered by a firmly rooted exception may have sufficient "indicia of reliability" to overcome a presumption that it is inadmissible under the Confrontation Clause. The issue in *Lee* was whether a co-defendant's confession satisfied reliability con-

<sup>5</sup> The statement did not fall within a firmly rooted hearsay exception, as it was admitted under a Georgia statute that varied from the common law by covering co-conspirator statements made after the termination of the conspiracy. See *Dutton*, 400 U.S. at 80-83 (comparing federal and state co-conspirator statement exceptions); *Bourjaily*, 483 U.S. at 183 (analyzing *Dutton*).

<sup>6</sup> Justice Harlan concurred in the result based on his view that the Confrontation Clause was not intended to regulate the admission of hearsay, and that the admission of the accomplice's statement did not violate due process. 400 U.S. at 93-100.

cerns because it "interlock[ed]" with the confession of the defendant. Comparing the two confessions, the Court found factual discrepancies that went to the heart of the issue at trial. 476 U.S. at 546. The Court thus rejected the claim that the co-defendant's confession was sufficiently trustworthy to be admitted without cross-examination. The Court nevertheless reaffirmed the principle that hearsay may be found reliable enough to be admitted without cross-examination when it is "marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" *Id.* at 543.

The courts of appeals have followed the lead of *Dutton* and *Lee* in examining the particular facts and circumstances that surround hearsay statements not falling within an established exception. As a matter of constitutional law, the courts have recognized that "[u]here is no mechanical test for determining the reliability of out-of-court statements." *Barker v. Morris*, 761 F.2d 1396, 1400 (9th Cir. 1985) (Kennedy, J.). In each case, the ultimate question is whether the hearsay statement has "sufficient indicia of reliability in order to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statements." *United States v. Iron Shell*, 633 F.2d 77, 87 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981). The proper inquiry should take into account all relevant information bearing on a statement's reliability. If no plausible line of cross-examination could have detracted from the statement's essential reliability under a practical view of the facts, there is no offense to the values of confrontation in admitting it. Compare *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986).<sup>7</sup>

<sup>7</sup> Some courts have found it useful to examine the standards developed in applying the residual exceptions to the hearsay rules. Fed. R. Evid. 803(24), 804(b)(5). See, e.g., *United States v. Nick*, 604 F.2d 1199, 1203 (9th Cir. 1979); *United States v. Dorian*, 803 F.2d 1439, 1444-1445 (8th Cir. 1986). Cases analyzing the question whether a statement has "circumstantial guarantees of trustworthiness" equivalent to those of the specific hearsay exceptions, see, e.g., *State v. Sorenson*, 143 Wis.2d 226, 243-254, 421 N.W.2d 77, 83-88 (1988), and authorities explaining and applying the traditional rationales of the hearsay exceptions, see 5 J. Wigmore, *Evidence*, § 1422, at 253-254 (J. Chadbourne rev. 1974), may be of value in identifying relevant considerations in the constitutional inquiry.



Without purporting to set forth an exhaustive list, we note that courts have considered the following factors to be significant, particularly in the child-abuse context: the corroborative evidence for a statement, including physical evidence of abuse;<sup>8</sup> and the defendant's opportunity to have committed it;<sup>9</sup> the child's motive in a particular situation to be truthful;<sup>10</sup> the identity of the person to whom the statement is made and the nature of the questioning that elicited it;<sup>11</sup> the plausibility of fabrication in light of the child's age,<sup>12</sup> specific statements,<sup>13</sup> and spontaneity of expression;<sup>14</sup> the proximity in time between the statement and the event;<sup>15</sup> and the relationship between the statement and any traditional hearsay exceptions.<sup>16</sup> There may, of course, be other features of the case that enhance the reliability of the statement and affect the impact on the

<sup>8</sup> See *United States v. Nick*, 604 F.2d at 1204 ("The child's statement was corroborated by physical evidence on his person and on his apparel.").

<sup>9</sup> *State v. Sorenson*, 143 Wis.2d at 246, 421 N.W.2d at 85.

<sup>10</sup> *State v. Sorenson*, 143 Wis.2d at 244, 421 N.W.2d at 84.

<sup>11</sup> *United States v. Dorian*, 803 F.2d at 1444 (questioners were "careful not to use leading or suggestive questions during any of the interviews").

<sup>12</sup> *United States v. Dorian*, 803 F.2d at 1445 ("a declarant's young age is a factor that may substantially lessen the degree of skepticism with which we view [her] motives").

<sup>13</sup> *United States v. Nick*, 604 F.2d at 1204 ("The childish terminology has the ring of verity and is entirely appropriate to a child of his tender years."); *Nelson v. Farrey*, 874 F.2d 1222, 1229 (7th Cir. 1989) ("Merely playing with anatomically correct dolls would not have given her the idea that one might be sprayed in the face with 'white mud' from an erect penis; the dolls aren't *that* anatomically correct.").

<sup>14</sup> Compare *Dutton v. Evans*, 400 U.S. at 88-89.

<sup>15</sup> *Morgan v. Foretich*, 846 F.2d 941, 947 (4th Cir. 1988) (statements were made "within three hours of the child's first opportunity to speak with her mother").

<sup>16</sup> Compare *Barker v. Morris*, 761 F.2d at 1401-1402 (noting analogies in statement to dying declarations and declarations against penal interest).

truth-seeking function of the trial of admitting the evidence without cross-examination.<sup>17</sup>

## 2. *The statements of respondent's daughter have particularized guarantees of trustworthiness*

The trial court in this case relied on several factors in determining that Idaho's residual exception to the hearsay rule was satisfied. The trial court noted that there was physical evidence of sexual abuse of the younger daughter that corroborated her statements. The court also observed that the daughter had no apparent motive for fabrication, and that the statements themselves were inconsistent with fantasy on the part of such a young girl. Further, the court closely examined the circumstances surrounding the most important aspect of the daughter's statements: the identification of her father as the abuser. The court noted that the doctor had testified that the physical injuries were inflicted at a time when her father and respondent had custody of her. The older daughter, who did testify at trial, had identified her father and respondent as having abused the younger child. Moreover, the younger child was perfectly capable of identifying her father, who was, of course, quite familiar to her. *Pet. App.* 30-31. These considerations led the trial court to believe that the child's statement possessed adequate circumstantial guarantees of trustworthiness.<sup>18</sup>

<sup>17</sup> See J. Myers, *Child Witness Law and Practice* § 5.37, at 360-372 (1987) (listing 30 factors that courts have considered in determining whether the testimony of a child is admissible under the residual exception). Some States have expressed policy judgments regarding the factors to be examined in admitting the hearsay statements of children in child abuse cases. See Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn. L. Rev. 523, 534 n.50 (1988) (collecting state statutes). As long as the statute adequately provides for a "case-specific finding of necessity," *Coy v. Iowa*, 108 S. Ct. 2798, 2805 (1988) (O'Connor, J., concurring), there is no barrier under the Confrontation Clause to acknowledging legislative guidance in this area.

<sup>18</sup> In approving the admission of these statements under the hearsay rule, the Idaho Supreme Court in *State v. Giles*, 115 Idaho at 988 n.2, 772 P.2d at 194-195 n.2, added that there was no custody battle that might have supported speculation that a parent had instigated false accusations of sexual abuse. In addition, the events recounted by the girl were recent enough for her to recall them easily, and she spontaneously described the abuse of her sister; both of those circumstances add to the trustworthiness of the statements.



At the same time, an opportunity to cross-examine the three-year-old declarant would have done little, if anything, to undermine the reliability of her statement to Dr. Jambura. A three-year-old would doubtless have difficulty remembering an event that occurred six months earlier, and at best would have a much poorer recollection than she had shortly after the event. Moreover, the pressure of her parents' influence would make any denial of the abuse or failure to recall it far less credible than her statements to Dr. Jambura. In short, because live testimony from the victim would be less reliable (and probably less impressive to a finder of fact) than the earlier, out-of-court declarations, it is unlikely that cross-examination of respondent's daughter would be of much assistance to respondent. See *United States v. Inadi*, 475 U.S. at 395-396 (live testimony from co-conspirators likely to be much less convincing than declarations made during the course of the conspiracy).

3. *The Idaho Supreme Court applied incorrect standards under the Confrontation Clause*

The Idaho Supreme Court did not analyze the hearsay statements of the younger daughter under the approach we have set forth. Rather, the court seemed to believe that special rules had to be observed in any interview involving a child before the child's out-of-court statements could satisfy the Confrontation Clause. In addition, the court seemed to focus on the quality of Dr. Jambura's trial testimony rather than on the statements of the younger daughter in determining whether particularized guarantees of trustworthiness were present. That approach is not compatible with the individualized inquiry into the reliability of hearsay statements required by the Confrontation Clause.

a. The Idaho Supreme Court justified its holding as follows:

[T]he hearsay declarations of the younger Wright girl are not trustworthy because of Dr. Jambura's interview technique: the questions and answers were not recorded on videotape for preservation and perusal by the defense at or before trial; and, blatantly leading questions were used in

the interrogation. Further, the statements lack trustworthiness because this interrogation was performed by someone with a preconceived idea of what the child should be disclosing.

Pet. App. 7-8. None of those reasons supports the court's finding of a constitutional violation. The Constitution does not require that doctors and young sex abuse victims conform their interviews to a rigid and prescribed formula in order to withstand Confrontation Clause scrutiny.

First, it is unrealistic to suppose that each time the prospect of sexual abuse is raised, a doctor must suspend his normal practice and locate sophisticated audio-visual equipment in order to preserve every detail of the doctor's interaction with the child. In *Nelson v. Farrey*, 874 F.2d 1222, 1229 (7th Cir. 1989), the court rejected a similar suggestion, pointing out that the approach was not "feasible." When a doctor is consulted to interview a victim of sex abuse, the doctor cannot know that a criminal prosecution is likely to follow. Moreover, "a routine practice of videotaping therapy sessions with child victims of sexual abuse" would be seen as inappropriate in many situations. *Ibid.* If videotaping were begun only when the prospect of criminal charges surfaced, a defendant could later argue that the contents were unreliable because the earlier sessions were not preserved. And videotaped sessions arranged after the initial interview might well lack the recency and spontaneity that contribute so significantly to the reliability of the victim's statements.

The court's criticism of Dr. Jambura's questioning style was similarly flawed. Dr. Jambura testified that he engaged the two-year-old girl in conversation by discussing neutral subjects such as what she had for breakfast. He then turned the conversation to her homelife in a general way before moving to her interaction with her father. His particular questions on that topic were in the form of "Do you" do this with "daddy," or "Does daddy" do this "with you." Those were perhaps the most indirect questions Dr. Jambura could have used to focus the girl's attention on the issue. J.A. 116-117. They were hardly, as the court below characterized them, "blatantly leading."

Moreover, the nature of the child's responses strongly undercuts the court's implication that the idea of sexual abuse was implanted by Dr. Jambura. The doctor testified that the girl's demeanor changed markedly when he asked whether sexual touching had occurred. Although she acknowledged that her father had touched her with his "pee-pee," she fell silent at the following question whether she had touched her father, until volunteering a few moments later that he "does do this with me, but he does it a lot more with my sister than with me." Pet. App. 61-62. Her change in demeanor, her dampened level of responsiveness, and her spontaneous disclosure that "he does it a lot more with my sister than with me" convincingly rebut the suggestion that leading questions interfered with the accuracy of her responses. Indeed, the contents of the girl's last response were not foreshadowed in any way by Dr. Jambura's questions.

Finally, the court did not fully explain its supposition that Dr. Jambura "may very well have had preconceptions." Pet. App. 15. In any event, there is no basis for speculating that the child's statements were tainted simply because Dr. Jambura was not a *tabula rasa* when he began the examination. In most cases, doctors who examine a child for sexual abuse will be fully informed about the purpose in advance. That is especially true when a specialist is called in. The Constitution cannot be read to create a per se rule that a doctor must be ignorant of the reasons for a consultation in order for statements made to him to be trustworthy.<sup>19</sup>

In forming its constitutional conclusions, the court relied heavily on psychological theories about the suggestibility of children and the vulnerability of their memories. Pet. App. 8-15. But there is no general consensus on such theories of memory. See Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1,

<sup>19</sup> Among other things, such an assumption would be incompatible with the rationale undergirding the medical exception to the hearsay rule. See Fed. R. Evid. 803(4). Moreover, the court's suggestion that the doctor should be in the

100 (1989) ("modern research is rapidly exploding the old bromide that children are always highly suggestible"). As a matter of state law, Idaho may apply its rules of evidence in light of asserted scientific truths as it sees fit. For example, many States, including Idaho, have relied on theories about the vulnerability of memory to impose procedural restraints on the admissibility of hypnotically enhanced or refreshed testimony. See *State v. Iwakiri*, 106 Idaho 618, 682 P.2d 571 (1984); cf. *Rock v. Arkansas*, 483 U.S. 44, 58-61 (1987) (discussing theories of the impact of hypnosis on memory and the legal response in the States). But the Confrontation Clause does not embody the particular views of memory and suggestibility that may appeal to a particular state court at a particular time. The court thus erred in approaching the conversation between Dr. Jambura and the respondent's younger daughter with an air of extreme skepticism based on unproved psychological theories.

b. The court also erred in allowing extraneous considerations to influence its Confrontation Clause analysis. For example, the court was troubled by the ambiguity of Dr. Jambura's description of the younger child's "admission" that her father had touched her with his "pee-pee." Pet. App. 15-16. The court stated that "[w]hether she said 'yes' or nodded agreeably is unclear." *Ibid.* But Dr. Jambura was a witness at trial, and if his narration was vague or ambiguous, the particulars could have been clarified on cross-examination of him. There is no basis for finding the hearsay statements to which Dr. Jambura testified lacking in trustworthiness simply because those statements could have been expressed more precisely by the testifying witness. Cf. *United States v. Owens*, 484 U.S. 554, 559-560 (1988).

dark makes the court's procedural guidelines for interviewing internally inconsistent. The court suggested that all consultations should be videotaped. But a doctor with no idea that sexual abuse was on the agenda could hardly be expected to set up video equipment on the spur of the moment.



Likewise, the court expressed disbelief about Dr. Jambura's veracity by qualifying its summary of his testimony with the remark that the younger daughter had "allegedly" volunteered the statement that her father had abused her but had done it more with her sister. Pet. App. 4. Again, doubts about Dr. Jambura's veracity could have been thoroughly explored in cross-examination of him. Compare *Dutton v. Evans*, 400 U.S. at 89 (noting that the defendant had exercised his right to confront the testifying witness on the "factual question" whether he actually heard the hearsay statement implicating the defendant); *United States v. Owens*, 108 S. Ct. at 842-843. The confrontation issue is not whether the statement was made, but whether the assertion it contains has "indicia of reliability." Doubts about whether the statement was made at all cannot be used to hold a hearsay statement constitutionally unreliable.

**B. The Hearsay Statements In This Case Have Additional Guarantees Of Reliability Because Of Their Resemblance To Statements "Made For Purposes Of Medical Diagnosis Or Treatment"**

The conclusion that a statement has particularized guarantees of trustworthiness may be supported by presence of circumstances that are analogous to the traditional hearsay exceptions. Cf. *Dutton v. Evans*, 400 U.S. at 89; *Barker v. Morris*, 761 F.2d at 1401. The statements in this case gather such additional reliability from their resemblance to statements satisfying the requirements of the "medical exception" to the hearsay rule.

1. The hearsay rules have long recognized an exception for statements made for purposes of medical treatment. Underpinning the exception is the recognition that patients have a powerful motive to speak candidly and truthfully to their physicians in order to secure proper medical attention. Such statements are therefore sufficiently trustworthy to be admitted without cross-examination. See *Meany v. United States*, 112 F.2d 538, 539

(2d Cir. 1940) (L. Hand, J.). As the Advisory Committee on the Federal Rules of Evidence explained, "[e]ven those few jurisdictions which have shied away from generally admitting statements of present conditions have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful." 28 U.S.C. App., p. 722 (1982). The Committee also observed that descriptions of past conditions and medical history, as well as narrations of causation that are "reasonably pertinent" to the purposes of consultation, are supported by the same guarantees of reliability. *Ibid.*

Federal Rule of Evidence 803(4) was framed in light of those principles. It provides an exception to the hearsay rule whether or not the declarant is available, and covers "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The federal rule incorporated the common law exception but broadened its coverage to include statements made for diagnosis *or* treatment.<sup>20</sup> The Committee explained that under "[c]onventional doctrine," statements made to a doctor only to inform him sufficiently to testify as an expert were not admitted under the medical exception. Advisory Committee Notes, 28 U.S.C. App., p. 722 (1982). The Committee rejected that limitation because a testifying expert would in any event be

<sup>20</sup> See H.R. Rep. No. 650, 93d Cong., 1st Sess. 14 (1973); S. Rep. No. 1277, 93d Cong., 2d Sess. 27 (1974); 4 D. Louisell & C. Mueller, *Federal Evidence* § 444, at 592-593 (1980 & Supp. 1989); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(4)[01], at 803-143, 803-145 (1988). Rule 803(4) may also have expanded upon common law principles in allowing not only statements of present symptoms, but also statements of past symptoms and those relating to causation. See *United States v. Iron Shell*, 633 F.2d at 83, 85; compare *United States v. Nickle*, 60 F.2d 372, 373-374 (8th Cir. 1932). Although the common law in some jurisdictions did not allow statements of past symptoms, the rule was evolving toward the admissibility of such statements, as supported by the same guarantees of trustworthiness that are found in statements about present symptoms. See 6 J. Wigmore, *Evidence* § 1722, at 118-127 (J. Chadbourne rev. 1976).



entitled to indicate the basis for his opinion, which would include such hearsay statements. The Committee believed that "the distinction thus called for was one most unlikely to be made by juries." *Ibid.*<sup>21</sup>

The medical exception applies to statements made to psychiatrists, see *United States v. Lechoco*, 542 F.2d 84 (D.C. Cir. 1976); *United States v. Deland*, 22 M.J. 70, 73 (C.M.A.), cert. denied, 479 U.S. 856 (1986), and psychologists, see *United States v. Provost*, 875 F.2d 172, 177 (8th Cir.), cert. denied, 110 S. Ct. 170 (1989). Moreover, the rationale for the exception covers statements that are intended to be relayed to medical professionals. Thus, the Advisory Committee notes explain that the exception can apply to "[s]tatements made to hospital attendants, ambulance drivers, or even members of the family." 28 U.S.C. App., p. 722 (1982).

In *United States v. Iron Shell*, 633 F.2d 77, 83-85 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981), the court of appeals formulated a two-part test for determining the admissibility of statements under Fed. R. Evid. 803(4). The court required a trial court to ask, "first, is the declarant's motive consistent with the purpose of the rule; and second, is it reasonable for the physician to rely on the information in the diagnosis or treatment." 633 F.2d at 84. The court justified its analysis by reference to the two underlying rationales of the exception—the reliability of statements made by a patient motivated to tell the truth, and the trustworthiness of information that a physician is willing to use in forming his opinion. *Ibid.*

The medical exception as construed in *Iron Shell* has supported the admission of testimony in many federal cases involv-

<sup>21</sup> Idaho's analogue to Fed. R. Evid. 803(4) differs from the federal rule. It excepts from the hearsay rule "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the source thereof insofar as reasonably pertinent to diagnosis or treatment." Idaho R. Evid. 803(4). Unlike the federal rule, Idaho does not include statements relating to "the inception or general character of the cause or external source" in the exception.

ing sexual abuse of children. For example, in *Iron Shell* itself the court allowed the testimony of a doctor about the statements made by a nine-year-old victim of sexual abuse describing the assault. The court was satisfied that the child had no motive in speaking to the doctor other than to report accurately the events that befell her. The court also found the description of her attack relevant to the "inception or general cause" of her symptoms and "reasonably pertinent to diagnosis or treatment" because it would help guide the course of the doctor's examination. 633 F.2d at 83.

*United States v. Renville*, 779 F.2d 430 (8th Cir. 1985), also demonstrates the application of Rule 803(4) in sexual abuse cases. There, a physician was permitted to relate the statements by an 11-year old girl that her father had performed sexual acts with her. In ruling that statements about the assailant's identity were covered by the medical exception, the court noted that "[s]tatements by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment." 779 F.2d at 436 (emphasis in original). The court explained that because "child abuse involves more than physical injury, the physician must be attentive to treating the emotional and psychological injuries which accompany this crime." *Id.* at 437.<sup>22</sup> Other decisions have followed the approach of *Iron Shell* and *Renville*. See *United States v. DeNoyer*, 811 F.2d 436, 438 (8th Cir. 1987) (statement to a social worker); *United States v. Shaw*, 824 F.2d 601, 608 (8th Cir. 1987) (statement to examining physician, who had prescribed treatment); *United States v. Provost*, 875 F.2d at 177 (statements to doctors during physical

<sup>22</sup> The court thus rejected intimations in *United States v. Iron Shell* (633 F.2d at 77) that statements identifying the assailant in sex abuse cases should not generally be admitted under the exception. *Renville* explained that although statements of "fault" are not covered by the medical exception when a patient is explaining the causes of bodily injury, the same considerations are not applicable to sexual assaults, where treatment has a psychological dimension as well. 779 F.2d at 439.

and psychological treatment); *United States v. Spotted War Bonnet*, 882 F.2d 1360, 1364 n.2 (8th Cir. 1989) (statement to clinical psychologist), petition for cert. pending, No. 89-6289.<sup>23</sup>

2. The admission of hearsay statements made for purposes of medical diagnosis or treatment does not violate a defendant's confrontation rights. Under this Court's analysis in *United States v. Inadi*, *supra*, such statements do not require a showing of the unavailability of the declarant. As in *Inadi*, the context of statements that are made to doctors in aid of diagnosis or treatment provides additional guarantees of trustworthiness that are not duplicated by in-court testimony.<sup>24</sup> Such statements also satisfy the "reliability" inquiry under the Confrontation Clause because they fall within a "firmly rooted" hearsay exception.

<sup>23</sup> The medical exception has also played a role in many military prosecutions under Mil. R. Evid. 803(4), the counterpart to the federal rule. See 4 J. Weinstein & M. Berger, *supra*, ¶ 803(4)[03], at 363-364 (Supp. 1989) (collecting cases). Many States have also admitted hearsay statements of the victim under the medical exception in sexual abuse prosecutions. See, e.g., *State v. Robinson*, 153 Ariz. 191, 199-200, 735 P.2d 801, 809-810 (1987) (victim's statements to psychologist, including identity of defendant, admissible); *State v. Hebert*, 480 A.2d 742, 748-749 (Me. 1984). Compare *Oldsen v. People*, 732 P.2d 1132, 1134-1136 (Colo. 1986) (declining to admit child's statement of sexual assault to social worker, psychologist, and physician, because child was not capable of appreciating need to furnish accurate information; but admitting same statements under residual hearsay exception). See generally Mosteller, *Child Sexual Abuse and Statements for the Purpose of Medical Diagnosis or Treatment*, 67 N.C.L. Rev. 257 (1989); Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn. L. Rev. 523 (1988).

<sup>24</sup> Compare *Inadi*, 475 U.S. at 395-396 (co-conspirator statements derive much of their significance from context in which they are made). See *United States v. Quick*, 22 M.J. 722, 725-726 (A.C.M.R. 1986) (applying *Inadi* to sexual abuse case), *aff'd* on other grounds, 26 M.J. 460 (C.M.A. 1988). But see *Nelson v. Farrey*, 874 F.2d 1222, 1231-1233 (7th Cir. 1989) (Flaum, J., concurring) (arguing that *Inadi*'s analysis does not justify dispensing with a showing of unavailability for declarant of medical-exception statements). In any event, as in this case, the declarant will often be "unavailable" in a child sex-abuse prosecution because of a practical inability to testify meaningfully in court. See, e.g., *United States v. Dorian*, 803 F.2d at 1446-1447.

Thus, in many sexual abuse cases, statements of the child to a treating physician may be admitted over a Confrontation Clause objection simply upon satisfying the medical exception to the hearsay rule.

The medical exception is as firmly rooted as other hearsay exceptions that this Court has addressed. Compare *Bourjaily*, 483 U.S. at 183 (co-conspirator statements); *Roberts*, 448 U.S. at 66 & n.8 (referring to dying declarations, cross-examined prior testimony, and business and public records exceptions). There is a long tradition of admitting reasonably pertinent hearsay statements made to treating physicians. See 6 J. Wigmore, *Evidence* §§ 1718-1722 (J. Chadbourne rev. 1976); C. McCormick, *Handbook of the Law of Evidence* § 292, at 690-692 (E. Cleary 2d ed. 1972).

To be sure, more complex Confrontation Clause issues may be raised as to statements made to a physician solely to enable him to give testimony.<sup>25</sup> Such statements are admissible under the Federal Rules of Evidence and the rules of many States, but were not generally admissible at common law. Whatever the correct Confrontation Clause analysis of such statements, those statements are not the kind presented here, or in the typical child sex-abuse case. An abused child is usually brought to a doctor or other professional principally, if not exclusively, for therapy and evaluation. Statements made in that context fully satisfy the requirements of the medical exception as formulated at common law.<sup>26</sup> Even when the doctor intends both to render treatment and to preserve or gather evidence in anticipation of trial, there is no reason to doubt the applicability of the exception. See *United States v. Iron Shell*, 633 F.2d at 86. The doctor's interest in eliciting accurate information and in im-

<sup>25</sup> See *Morgan v. Foretich*, 846 F.2d 941, 952 (4th Cir. 1988) (Powell, J., concurring in part and dissenting in part); *Nelson v. Farrey*, 874 F.2d 1222, 1233-1234 (7th Cir. 1989) (Flaum, J., concurring).

<sup>26</sup> For example, Justice Powell, sitting with the Fourth Circuit, has observed that the statements admitted by the Eighth Circuit in *United States v. Iron Shell* and *United States v. Renville* satisfied the "traditional common law test." *Morgan v. Foretich*, 846 F.2d at 952 (Powell, J., concurring in part and dissenting in part).

pressing the importance of candor upon the young patient applies with full force. The doctor's awareness that there may be other uses for the same information does not detract from the reliability of the statements made.<sup>27</sup>

3. In this case, although the State urged the application of the medical exception to the statements of respondent's younger daughter, as well as several other exceptions, the trial court did not admit the evidence under the medical exception to the hearsay rule. Instead, the court relied on Idaho's residual hearsay exception to admit the statement. See J.A. 25-26, 108-115.

The hearsay question, of course, is not before this Court. Nonetheless, the resemblance between the context of the statements here and the context required for the medical exception is relevant. Even if not precisely within the medical exception, the statements in this case have some of the same assurances of reliability that underlie the medical exception. That similarity of context strengthens the conclusion that the record establishes the particularized guarantees of trustworthiness needed to admit the statements over a Confrontation Clause objection.

<sup>27</sup> Other firmly rooted hearsay exceptions may also support the admission of reports of sexual abuse by children. For example, the "excited utterance" exception, Fed. R. Evid. 801(d)(2), has been invoked in several cases. See Note, *A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases*, 83 Colum. L. Rev. 1745, 1753-1755 (1983). Both in sexual assault cases and in other types of prosecutions, courts have found this exception to be "firmly rooted" for purposes of satisfying Confrontation Clause objections. See *United States v. Vazquez*, 857 F.2d 857, 864-865 (1st Cir. 1988); *Haggins v. Warden*, 715 F.2d 1050, 1055-1058 (6th Cir. 1983) (reports of four-year-old victim of sexual assault to nurses and police officers), cert. denied, 464 U.S. 1071 (1984); *United States v. Nick*, 604 F.2d at 1202-1204 (three-year-old victim's statement to his mother identifying the defendant and describing the assault). Other exceptions may apply as well, such as the exceptions for "[p]resent sense impression," Fed. R. Evid. 803(1), or "[t]hen existing mental, emotional, or physical condition," Fed. R. Evid. 803(3).

## CONCLUSION

The judgment of the Supreme Court of Idaho should be reversed.

Respectfully submitted.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

THE STATE OF IDAHO,  
*Petitioner,*  
vs.

LAURA LEE WRIGHT,  
*Respondent.*

On Writ of Certiorari to the  
Supreme Court of Idaho

BRIEF OF *AMICI CURIAE*  
AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE  
OF CHILDREN, AMERICAN ACADEMY OF PEDIATRICS,  
AMERICAN MEDICAL ASSOCIATION, NATIONAL  
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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

\_\_\_\_\_  
No. 89-260  
\_\_\_\_\_

THE STATE OF IDAHO,  
*Petitioner,*  
vs.

LAURA LEE WRIGHT,  
*Respondent.*

\_\_\_\_\_  
On Writ of Certiorari  
to the Supreme Court of Idaho  
\_\_\_\_\_

BRIEF OF *AMICI CURIAE*  
AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE  
OF CHILDREN, AMERICAN ACADEMY OF PEDIATRICS,  
AMERICAN MEDICAL ASSOCIATION, NATIONAL  
ORGANIZATION FOR WOMEN, NATIONAL  
ASSOCIATION OF COUNSEL FOR CHILDREN, STATE OF  
RHODE ISLAND OFFICE OF THE CHILD ADVOCATE, AND  
SUPPORT CENTER FOR CHILD ADVOCATES

\_\_\_\_\_  
**INTERESTS OF THE *AMICI CURIAE***

The American Professional Society on the Abuse of Children (APSAC) is a multidisciplinary society of professionals working in the fields of child abuse research, prevention, treatment, investigation, litigation, and policy.<sup>1</sup> The purposes of APSAC are to promote effective identification, intervention, and treatment of abused children, their families, and offending individuals, to increase knowledge about abuse, and to improve the competence of professionals work-

1. Section II of this brief was prepared by Gail S. Goodman, Ph.D., Department of Psychology, State University of New York at Buffalo and Karen J. Saywitz, Ph.D., Department of Psychiatry, UCLA. Josephine Bulkley, J.D. and others also assisted.

ing with abused children and their families. APSAC was founded in 1987, and now has more than 1100 members.

The American Academy of Pediatrics (AAP) was founded in 1930 to create an independent forum for the special health and development needs of children. AAP is a nonprofit association of approximately 38,000 physicians specializing in the care of infants, children, and adolescents. The AAP's principal purpose is to ensure the attainment by all children of their full potential for physical, emotional and social health. To these ends, AAP's members frequently are called upon to testify regarding the condition of such children. The AAP is concerned that the physician's ability to provide proper treatment and counseling not be burdened by legal requirements surrounding the interview process unless mandated by the Constitution and laws, and that any such requirements be sensitive to the particular difficulties attendant upon detecting child sexual abuse.

The American Medical Association (AMA) is a private voluntary, nonprofit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physicians and medical students.

The National Association of Counsel for Children (NACC) is a voluntary national membership organization concerned with the rights and interests of children who are the subject of child protective, matrimonial, and custody litigation. Established in 1977, the Association has 1200 members in fifty states.

The National Organization for Women (NOW), founded in 1966, is the largest organization in the United States devoted to protecting and securing women's rights. NOW has over 250,000 members and 792 chapters nationwide, and actively supports legal and legislative action to protect victims of child abuse.

The State of Rhode Island Office of the Child Advocate is a state agency designated by the Rhode Island General Assembly to protect the civil, legal, and special interests of abused and neglected children in state care and day care settings.

The Support Center for Child Advocates is a Pennsylvania nonprofit corporation that provides free legal and social services to abused and neglected children in criminal and juvenile court proceedings in the city of Philadelphia. Legal services are provided by staff attorneys and more than four hundred volunteer members of the Philadelphia bar. Social work services are provided through a staff of six social workers.

*Amici*, with the written consent of the parties, submit this brief as *amici curiae* to call the Court's attention to the widespread and potentially harmful impact which several conclusions of the Idaho Supreme Court could have on the way children are interviewed in child sexual abuse cases. This brief supports neither party, and *Amici* take no position on whether the hearsay statements at issue in this case should have been admitted or excluded from evidence.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Sexual abuse of children is a tragic phenomenon affecting thousands of children. Although the precise prevalence of sexual abuse is unknown, research discloses that abuse is widespread. The first national survey investigating personal histories of child sexual abuse was conducted by the *Los Angeles Times Poll* in 1985. "A history of sexual abuse was disclosed by 27% of the women and 16% of the men" surveyed.<sup>2</sup> The American Humane Association estimates that 132,000 children were sexually abused in 1986.<sup>3</sup> The Association also reports that "estimates of the number of children sexually maltreated . . . have increased significantly between 1976 and 1986."<sup>4</sup> Most child sexual abuse is never reported to authorities, and the actual prevalence rate is probably higher than the estimates of the American Humane Association.<sup>5</sup> Age offers no protection from sexual abuse. Victims range from infants to adolescents.<sup>6</sup>

2. Finkelhor, Hotaling, Lewis & Smith, *Sexual Abuse and Its Relationship to Later Sexual Satisfaction, Marital Status, Religion, and Attitudes*, 4 J. Interpersonal Violence 379, 381 (1989).

3. American Humane Association, *Highlights of Official Child Neglect and Abuse Reporting 1986* 23 (1988) [hereafter cited as *Highlights*].

4. *Id.*

5. Russell, *The Incidence and Prevalence of Intrafamilial and Extrafamilial Sexual Abuse of Female Children*, 7 Child Abuse & Neglect 133 (1983).

6. See *Highlights*, *supra* note 3 at 21.



Although most victims of child sexual abuse go on to productive and satisfying adult lives, the clinical and scientific literature establishes that sexual abuse has serious short and long-term consequences for many victims. In particular, sexual abuse is associated with a wide variety of medical, mental health, and social problems of adolescence and adulthood.<sup>7</sup>

The scope and consequences of child sexual abuse require a decisive response from society and, in particular, from the legal system. As the Court has observed, however, "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Furthermore, corroborating medical evidence exists in only a minority of cases.<sup>8</sup> In many cases, the ability to prove abuse turns on children's trial testimony and the admissibility of their out-of-court statements. Because of the paucity of evidence that plagues child abuse litigation, children's hearsay statements play a vital evidentiary role.

Although there are many hearsay exceptions, only a handful are important in the day-to-day run of child abuse cases. The exception employed most frequently authorizes admission of excited utterances. Fed. R. Evid. 803(2). Also of great importance is the exception for statements for purposes of medical diagnosis or treatment. *Id.* 803(4). Of particular importance in the present litigation, courts frequently employ the so-called residual exceptions to admit reliable hearsay statements of children. *Id.* 803(24), 804(b)(5). Finally, and of equal relevance in the present case, a majority of states have enacted special hearsay exceptions for reliable out-of-court statements of children in child abuse litigation.<sup>9</sup> These statutes are essentially residual exceptions for child abuse cases.

The Confrontation Clause of the Sixth Amendment works in tandem with the hearsay rule to exclude unreliable evidence. *Califor-*

7. See *Lasting Effects of Child Sexual Abuse* (G. Wyatt & G. Powell eds. 1988).

8. Myers, Bays, Becker, Berliner, Corwin & Saywitz, *Expert Testimony in Child Sexual Abuse Litigation*, 68 Neb. L. Rev. 1, 34 (1989).

9. American Bar Association, National Legal Resource Center for Child Advocacy and Protection, *Protecting Child Victim/Witnesses—Sample Laws and Materials* 51 (2d ed. R. Eatman & J. Bulkley eds. 1987).

*nia v. Green*, 399 U.S. 149, 155 (1970); *Dutton v. Evans*, 400 U.S. 74, 86-87 (1970). Like the hearsay rule, the Confrontation Clause seeks to "advance 'the accuracy of the truth-determining process in criminal trials.'" *Tennessee v. Street*, 471 U.S. 409, 415 (1985). To this end, "[t]he focus of the Court's concern has been to insure that there are 'indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' . . . and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement . . .'" *Mancusi v. Stubbs*, 408 U.S. 204, 213 (1972).

The Court has long held that a defendant's right to confront accusatory witnesses, although vitally important, is not absolute, and can be balanced against competing interests. *Ohio v. Roberts*, 448 U.S. 56, 64 (1980); *Mattox v. United States*, 156 U.S. 237, 243 (1895). The confrontation right is balanced against the state interests in "effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." *Ohio v. Roberts*, 448 U.S. 56, 64 (1980). In the context of child abuse litigation, an additional interest is at work. The state has a strong *parens patriae* interest in protecting children. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). In some cases, a child's out-of-court statements are the most powerful evidence of abuse, and the need for the statements is compelling. As stated in *Bourjaily v. United States*, 483 U.S. 171 (1987), the Court has "attempted to harmonize the goal of the Clause—placing limits on the kind of evidence that may be received against a defendant—with a societal interest in accurate fact finding, which may require consideration of out-of-court statements." *Id.* at 182. Nowhere is the need for out-of-court statements greater than in child abuse litigation.

The trustworthiness of a particular hearsay statement is evaluated in light of the circumstances of the case. With the residual and child hearsay exceptions in particular, courts consider a wide array of factors to determine whether hearsay passes muster under the Confrontation Clause and the rules of evidence. (Reliability factors considered by the courts are discussed in section IV., *infra*). Unfortunately, in the present case, the decision of the Idaho Supreme Court appears to elevate three reliability factors above all others, and to establish them as virtual litmus tests of reliability. The Idaho court

ruled that a child's statements to a pediatrician during an interview were untrustworthy because: (1) the interview was not videotaped, (2) the doctor employed leading questions, and (3) the doctor was aware that the child may have been sexually abused. *Amici* acknowledge that these factors are relevant in the assessment of reliability. *Amici* respectfully submit, however, that the Idaho court overestimated the value of these factors as indicators of reliability. Exaggerating the importance of videotaping, leading questions, and interviewer knowledge of a child's circumstances will cause courts to place unwarranted reliance on these factors to the exclusion of other, equally important, indicia of reliability, and will lead to exclusion of reliable hearsay.

Most interviews of children cannot, as a practical matter, be videotaped or otherwise recorded. Research and clinical experience establish that it is often necessary and proper during interviews of young children to employ directed questions, some of which may be leading. Finally, contrary to the conclusion of the Idaho Supreme Court, possession by an interviewer of background information on a child need not undermine the reliability of what the child states during an interview. *Amici* respectfully urge the Court not to adopt the Idaho Supreme Court's narrow focus on three reliability factors, and to adhere instead to the well-established judicial practice of considering all factors that bear on reliability of hearsay offered under residual and child hearsay exceptions.

## ARGUMENT

### I. CHILDREN DISCLOSE SEXUAL ABUSE IN A VARIETY OF WAYS, FEW OF WHICH LEND THEMSELVES TO AUDIO OR VIDEOTAPING

Disclosing sexual abuse is difficult for most children, and research demonstrates that in many cases abuse is not disclosed during childhood.<sup>10</sup> Abuse that does come to light is disclosed in several ways. Some children reveal abuse to their parents. Others confide in a trusted adult outside the family, such as a teacher. Children some-

10. Finkelhor, Hotaling & Smith, *Risk Factors for Sexual Abuse in a National Survey of Adult Men and Women*, 14 *Child Abuse & Neglect* 19 (1990) (42% of males and 33% of females did not disclose abuse during childhood until questioned as adults).

times disclose their "secret" to a friend, who, in turn, reports the abuse to their parent. For many children, however, the fear and embarrassment that accompany sexual abuse prevent disclosure. When the child cannot tell, adult suspicion about abuse may be kindled by changes in the child's behavior such as nightmares, fear of specific persons or places, unusual knowledge of sexual matters, sexualized play, or medical evidence of abuse.

The realization that their child has been sexually abused comes as a terrible shock to parents, and the first thought of many is to rush to the pediatrician, family doctor, or hospital emergency room. Thus, in many cases physicians are the first professionals to interview children. Such interviews often occur on an emergency basis in the doctor's office or hospital. In other cases, the first professionals to interview children are police officers or social workers employed by child protective services agencies. These professionals may talk to children at home, in the police car on the way to the hospital, at school, or at a children's shelter. In some cases, children first disclose abuse to mental health professionals providing therapy. In such cases, the therapist may have no advance notice of when the child will unlock the secret of abuse. Thus, children disclose sexual abuse in a wide variety of settings and at unpredictable times. Seldom is a tape recorder or video camera available at the critical moment. Yet, children's statements during interviews may bear all the hallmarks of trustworthiness. Given the myriad circumstances in which children are interviewed, interposition of audio or video recording as a litmus test for reliability leads to exclusion of reliable evidence.

The marked reluctance of many children to discuss sexual abuse during interviews illustrates the danger of equating audio or video recording with reliability. In intrafamilial abuse cases, most victims are intimidated into silence. Summit writes that "[h]owever gentle or menacing the intimidation may be, the secrecy makes it clear to the child that this is something bad and dangerous. The secrecy is both the source of fear and the promise of safety: 'Everything will be all right if you just don't tell.'"<sup>11</sup> Threats and coercion are common in extrafamilial abuse as well. In Finkelhor and Williams' national study of sexual abuse in day care, approximately 50% of victims were

11. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *Child Abuse & Neglect* 177, 181 (1983).



threatened with harm to themselves or their families if they disclosed sexual abuse.<sup>12</sup> In addition to fear of reprisal, many youngsters keep the secret of sexual abuse because they believe the abuse is somehow their fault, and that if they tell, they will be disbelieved, punished, or disliked.

Thus, many sexually abused children are slow to disclose during the interview process. A recent study by Sorensen and Snow illustrates children's resistance to disclosure. The researchers evaluated 116 cases in which sexual abuse was confirmed by criminal conviction, confession, or strong medical evidence of abuse. During early interviews, most children denied having been abused.<sup>13</sup> For many children, disclosure is a gradual process that can take weeks or months. Furthermore, many children disclose a little at a time, to test the reactions of adults. If the interviewer does not respond with shock or disgust, the child feels confident to reveal a little more. Portions of what a child reveals during interviews may be sufficiently reliable to gain admission in evidence, but in most cases it is impossible to videotape hours of interviews extending over days, weeks, or months; revealing again the harm that flows from equating reliability with audio or video recording.

In addition to the serious practical problems raised by audio and videotaping, it is important to note the current divergence of professional opinion on the wisdom of recording interviews. In 1986 the California State Legislature established the Child Victim Witness Judicial Advisory Committee to study investigative and judicial practices pertaining to child witnesses, and to make recommendations to the Legislature for reform. In its Final Report, the Committee wrote that "[t]he value of videotaping interviews with children is a highly controversial issue."<sup>14</sup> The Committee found the issues surrounding videotaping so unsettled that it could offer no recommendation to the California Legislature on whether interviews should

12. D. Finkelhor & L. Williams, *Nursery Crimes: Sexual Abuse in Day Care* 104 (1988).

13. Sorensen & Snow, *How Children Tell: The Process of Disclosure* (Paper presented at The Eighth National Conference on Child Abuse and Neglect, October 23, 1989).

14. *California Child Victim Witness Judicial Advisory Committee: Final Report* 28 (1988).

be recorded.<sup>15</sup>

An issue not mentioned by the Committee, but of great concern to parents of sexually abused children, concerns the confidentiality of videotapes. In some cases, highly sensitive tapes of children have found their way onto television news programs, to the embarrassment of children and their families. Systems for protecting confidential videotapes have not been perfected.

There is no doubt that the difficult task of evaluating the reliability of children's out-of-court statements can be facilitated by audio or videotaping, and taping should be encouraged in some circumstances. It is a mistake, however, to exaggerate the importance of videotaping. Although the presence or absence of a videotape is relevant in the assessment of reliability, videotaping is not the *sine qua non* of trustworthiness. Courts consider a host of factors to determine whether hearsay bears the circumstantial guarantees of trustworthiness required by the Sixth Amendment and the rules of evidence. (See Section IV., *infra*) Videotaping is an important factor, but only one among many. With due respect for the Idaho Supreme Court, *Amici* suggest that the lower court accorded exaggerated importance to videotaping interviews.

Bearing in mind the tremendous practical problems engendered by videotaping, the considerable professional uncertainty and disagreement that surrounds the subject, and the availability of other means to assess reliability, it is respectfully submitted that it would be premature and potentially very damaging to engraft audio or videotaping onto the Sixth Amendment as a litmus test for the reliability of children's hearsay statements.

## II. DURING INTERVIEWS, DIRECTIVE AND LEADING QUESTIONS SHOULD BE USED SPARINGLY, HOWEVER, SUCH QUESTIONS ARE SOMETIMES NECESSARY WITH YOUNG CHILDREN, AND DO NOT NECESSARILY UNDERMINE THE RELIABILITY OF CHILDREN'S HEARSAY STATEMENTS

Interviewing young children is a delicate task requiring considerable skill and patience. There is no single "right" or "wrong" way

15. *Id.* at 29.



to interview children, and professionals continue to develop and improve interview techniques. Various professional organizations have promulgated guidelines for interviewing, which are updated as new knowledge develops.<sup>16</sup>

The consensus of professional opinion is that the interviewer should begin by establishing an atmosphere in which the child feels comfortable and free to talk. Initial questioning should be as non-directive and open-ended as possible to encourage spontaneous statements. When young children fail to respond to generic, open-ended questions, more directive questioning may be necessary. At some point during the interview, it is usually necessary to question the child directly about possible sexual abuse. When directive questioning is employed, the interviewer proceeds along a continuum, usually beginning with questions that simply direct the child's attention to a particular topic, and, when necessary, moving gradually to more specific questions. Highly specific questions, which may be leading, are generally to be avoided unless other methods of questioning fail, and the interviewer possesses reliable information indicating that abuse has occurred. In many cases, however, especially with young children, highly specific questions are necessary to elicit reliable information. No two interviews are the same, and professional judgment and discretion remain key components of the interview process.

The psychological dynamics of sexual abuse, which cause many children to resist disclosure, combine with the developmental immaturity of young children to justify greater use of directive questioning than is ordinarily necessary with older children and adolescents.<sup>17</sup>

16. See, e.g., American Medical Association, *Diagnostic and Treatment Guidelines Concerning Child Abuse and Neglect*, 254 J.A.M.A. 796 (1985); American Academy of Child and Adolescent Psychiatry, *Guidelines for the Clinical Evaluation of Child and Adolescent Sexual Abuse*, 27 J. Am. Acad. Child & Adolescent Psychiatry 655 (1988); American Professional Society on the Abuse of Children, *Proposed Guidelines for Evaluation of Suspected Sexual Abuse in Young Children*, 3 The APSAC Advisor (in press).

17. An analogy can be drawn between the need for leading questions during interviews of young children, and the need for such questions during direct examination of some child witnesses at trial. Normally, leading questions are not permitted on direct examination. Fed. R. Evid. 611(c). However, the Advisory Committee on

Unfortunately, however, the very children who need the most directive questioning are the ones about whom there is the most concern about suggestibility, memory, and ability to distinguish fact from fantasy. Thus, it is important to review current scientific knowledge of children's memory, suggestibility, and ability to differentiate fact from fantasy. An understanding of children's developmental capabilities and limitations makes it possible to gauge the influence of leading questions on the reliability of children's descriptions of sexual abuse. A review of current psychological literature is also needed to update, and, in some respects, take issue with the discussion of child development contained in the Idaho Supreme Court's decision in this case. The Idaho court's conclusions about children's memory, suggestibility, and ability to distinguish fact and fantasy are based in large part on controversial assumptions about child development and proper interviewing technique. Many of the Idaho court's assumptions concerning the reliability of children's statements are not supported by current scientific and clinical literature.

In discussing children's ability to provide accurate reports of events they have experienced or witnessed, it is important to keep in mind that across ages, children vary widely in their abilities. A two-and-a-half-year-old has different abilities than a five-year-old, and a five-year-old has different abilities than a ten-year-old. It is equally important to note that children of the same age differ markedly. One three-year-old will be an excellent reporter of events, while another will say nothing. Thus, in considering children's ability to describe events, one should not treat children as a single, uniform group.

Taken as a whole, research and theory in the field of child development suggest that children, like adults, bring both strengths and weaknesses to the interview room and the witness stand. Children can demonstrate adult-like reliability when providing certain kinds of information, under certain conditions. In other situations,

the Federal Rules of Evidence expressly noted the propriety of leading questions with "the child witness or the adult with communication problems." Fed. R. Evid. 611(c) advisory committee's note. The decisions are legion approving leading questioning during direct examination of children who are reluctant to testify. See, e.g., *United States v. Rossbach*, 701 F.2d 713, 718 (8th Cir. 1983); *United States v. Iron Shell*, 633 F.2d 77, 92 (8th Cir. 1980), cert. denied, 450 U.S. 1001 (1981). See J. Myers, *Child Witness Law and Practice* Section 4.6, at 130 n. 16 (1987) (collecting cases).

children perform less well than adults. To further complicate matters, there are some conditions under which children may actually outperform adults. For example, children sometimes observe and remember details that adults overlook. Thus, it is a mistake to conclude that children are uniformly less reliable reporters of events than adults.

#### A. Memory

Memory is not always accurate. This is a truism for adults as well as for children. However, memory for the gist of events and for personally significant events tends to be more accurate than memory for details or for events of little consequence to one's life or interests. Only recently have psychologists focused their study on children's descriptions of real-life events of personal significance to them.

Research suggests that even young children possess the memory skills needed to recall events and testify, at least when they are asked simple questions in a supportive atmosphere.<sup>18</sup> Research shows that even infants have long-term memories for familiar events as well as some novel events.<sup>19</sup> Although infants cannot communicate their memories in words, they can remember events for weeks at a time.

Once toddlerhood is achieved, at about age one, children can retain information for longer durations and can verbalize at least parts of their memories. Familiar, repeated events, as well as novel, one-time events, can be retained in the memories of young children.<sup>20</sup> Traumatic and other negative events, such as sexual assault, that children witness or experience in early childhood, can also be retained, even by two-year-olds, who can use words to describe parts

18. G. Melton, J. Petrila, N. Poythress & C. Slobogin, *Psychological Evaluations for the Courts* 102 (1987).

19. Fagen, *Infants' Delayed Recognition Memory and Forgetting*, 16 J. Experimental Child Psychology 424 (1973); Myers, Clifton & Clarkson, *When They Were Very Young: Almost-Threes Remember Two Years Ago*, 10 Infant Behavior and Development 123 (1987) (behaviors of children approaching their third birthday demonstrated memories retained from infancy).

20. K. Nelson, *Event Knowledge: Structure and Function in Development* (1986).

of their memories.<sup>21</sup> In several studies, some including children as young as three years of age, researchers found that memory for stressful events is even more enduring than memory for nonstressful events in children.<sup>22</sup> In a more limited set of studies, researchers found that stress can inhibit children's memory.<sup>23</sup>

One of the most stable findings in memory research is that when young children are asked open-ended questions, they spontaneously recall less information than older children and adults. This is not to say that young children necessarily remember less, but that their developing memories are not as proficient at the task of "free recall" (that is, recounting an event in response to a very general, open-ended question such as "What happened?").

Although young children typically recall less than older children and adults, research reveals that, absent motivation to lie, children tend to recall real-life events they have experienced quite accurately. Children's recall appears to contain no more error than the recall of older children or adults. When psychologists say that "most of the development of accurate recall skills occurs between the ages of five and ten," as the Idaho court reported in this case, 775 P.2d at 1227, they are referring to the ability to report *greater amounts* of accurate information. The quoted statement should not be taken to imply that

21. Miller & Sperry, *Early Talk About the Past: The Origins of Conversational Stories of Personal Experience*, J. Child Language (in press); Terr, *What Happens to Early Memories of Trauma? A Study of 20 Children Under Age 5 at the Time of Documented Traumatic Events*, 27 J. Am. Acad. Child & Adolescent Psychiatry 96 (1988).

22. Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press); J. Ochsner & M. Zaragoza, *The Accuracy and Suggestibility of Children's Memory for Neutral and Criminal Eyewitness Events* (Paper presented at the American Psychology and Law Association, March, 1988); A. Warren-Leubecker, C. Bradley & I. Hinton, *Scripts and the Development of Flashbulb Memories* (Paper presented at the Conference on Human Development, March, 1988).

23. Peters, *The Impact of Naturally Occurring Stress on Children's Memory*, in *Children's Eyewitness Memory* 122 (S. Ceci, M. Toglia & D. Ross eds. 1987).



younger children tend to be less accurate in their recall than older children and adults. The standard developmental finding is that with age, free recall becomes more complete, not necessarily more accurate. In psychological studies, children tend more often to omit information than to report events that did not occur.<sup>24</sup>

The difficulty young children experience with free recall means that young children often require "cuing" of their memories. Whereas an adult, teenager, or older child might be able to provide a detailed account of an event in response to an open-ended question about "what happened," young children are more likely to need specific questions or reminders of an event to activate their memories.<sup>25</sup> For example, in a study of children's memory for daily routines, two-year-olds generally required more specific prompts than four-year-olds.<sup>26</sup> Price and Goodman found that two-and-a-half-year-olds, on their own, could recall little about a repeated event, but were able to

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24. Children of different ages may make different types of memory errors. One study found that in reporting an event, adults made more errors of "intrusion," that is, of information that did not occur but that would be expected to have occurred (e.g., stating that upon meeting someone, they shook the person's hand when in fact they had not), whereas errors made by young children tended to be fantasy errors, although most young children made no such errors. Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 *Law & Human Behavior* 317 (1986).

Memory researchers used to think that the use of conscious memory strategies such as "rehearsal" (repeating information over and over in one's mind as one might do in trying to remember a new phone number) was necessary for the formation of long-term memories, and that young children did not possess or use memory strategies. These ideas are no longer generally accepted. Craik & Lockhart, *Levels of Processing: A Framework for Memory Research*, 11 *J. Verbal Learning & Verbal Behavior* 671 (1972). Although considerable development occurs in the use of memory strategies between the ages of five and ten years, even young children possess and use simple memory strategies. DeLoache & Todd, *Young Children's Use of Spatial Categorization as a Mnemonic Strategy*, 46 *J. Experimental Child Psychology* 1 (1988); DeLoache, Cassidy & Brown, *Precursors of Mnemonic Strategies in Very Young Children's Memory*, 56 *Child Development* 125 (1985). Children do not, however, use memory strategies as well or as pervasively as do adults. In any case, it is now realized that the use of explicit memory strategies is not necessary for the formation or retrieval of memories. Many real-life events are retained well by children and adults without the use of conscious memory strategies such as "rehearsal" or "elaboration" (relating a new event to previously experienced events).

communicate their memories in more detail when given toy props to act out the event, or when placed back in the room where the event occurred.<sup>27</sup> Thus, unlike adults or even older children, young children often have a special deficit in providing accounts of events on their own. Moreover, young children may lack the words needed to articulate their memories. At times, questioning, as a form of memory cuing, may be required to elicit information from young children.

In sum, young children generally can accurately recall and relate what they have experienced. They may need help to do so, however, which raises the issues of suggestibility and leading questions.

#### B. Suggestibility and Leading Questions

Are young children so suggestible that their reports of sexual abuse during interviews should be rejected unless the interviews are videotaped? There is legitimate concern that young children's reports of sexual abuse become a blend of their initial memories plus information suggested by interviewers, parents, and others. But adults are suggestible too, and children are not always more suggestible than adults.

The argument is sometimes made in child abuse litigation that persons who interviewed a child employed leading questions that may have misled the child into inaccurate or false allegations of sexual abuse. In some cases this argument has merit. It is important to reiterate, however, that the developmental limitations of young children sometimes necessitate careful use of specific and, at times,

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25. *New Directions for Child Development* (Vol. 10, M. Perlmutter ed. 1980); Price & Goodman, *Visiting the Wizard: Children's Memory for a Recurring Event*, *Child Development* (in press).

26. Wellman & Somerville, *Quasi-Naturalistic Tasks in the Study of Cognition: The Memory-Related Skills of Toddlers*, in *New Directions for Child Development* (Vol. 10, M. Perlmutter ed. 1980).

27. Price & Goodman, *Visiting the Wizard: Children's Memory for a Recurring Event*, *Child Development* (in press).



leading questions. Furthermore, modern research discloses that young children are more resistant to suggestive questioning than many adults believe.

Studies on children's suggestibility differ greatly in their relevance to child abuse litigation. Most studies involve brief presentations of pictures, films, or stories that children may not remember well and that do not involve their own bodies.<sup>28</sup> Such studies do not involve personally significant events such as sexual abuse. Goodman and Helgeson caution against generalizing from such studies to children's suggestibility regarding real-life events.<sup>29</sup> Other studies do concern children's suggestibility about personally experienced events, and ask questions like those asked by the physician in the instant case. 775 P.2d at 1225. In its discussion of psychological literature on suggestibility, the Idaho Supreme Court did not differentiate between studies that are relevant to real-life events experienced by children, and studies that are less germane to child abuse investigations and interviews.

Overall, studies have not converged on a simple relation between age and suggestibility.<sup>30</sup> It is clear, however, that children are not always more suggestible than adults. When and if a person (child or adult) is suggestible depends on cognitive, social, emotional, and situational factors such as level of interest or salience of an event. Other factors, some of which were mentioned by the lower court in this case, may also be important, and are discussed below.

Researchers consistently find that children ten to eleven-years-old are no more suggestible than adults. Four to nine-year-olds are sometimes more suggestible than older children and adults. Even

28. Cohen & Harnick, *The Susceptibility of Child Witnesses to Suggestion: An Empirical Study*, 4 Law & Human Behavior 201 (1989); Loftus & Davies, *Distortions in the Memory of Children*, 40 J. Social Issues 51 (1984).

29. Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law*, 40 U. Miami L. Rev. 181 (1985).

30. Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in *Children's Eyewitness Memory* 53 (S. Ceci, M. Toglia & D. Ross eds. 1987).

three-year-olds are not always more suggestible, although there appears to be a greater risk of suggestibility in very young children.<sup>31</sup> Young children may be particularly subject to the influence of suggestion regarding peripheral details and ambiguous events. When an event is ambiguous, there is some evidence that young children's labels for the event can be manipulated through strongly worded interrogation, but children's answers to specific questions about the event remain accurate.<sup>32</sup> Resistance to suggestion appears to be highest concerning the core aspects of events. Moreover, participation in an event, as opposed to mere observation, appears to lower children's suggestibility.<sup>33</sup>

In recent years, studies have been conducted which have concerned children's suggestibility when leading questions about abuse are asked. These studies were not cited by the Idaho Supreme Court. For example, researchers have studied children's suggestibility about personally significant and sometimes stressful events such as receiving a genital examination or inoculations by a doctor. Researchers have also studied children's suggestibility regarding crime-like events, as well as nonstressful, noncrime-like events, following which children were interviewed with leading questions such as "He took your clothes off, didn't he?" to determine if false reports of abuse could be elicited. These studies indicate that children as young as four years of age do not make significantly more false reports (for example, by

31. Ceci, Ross & Toglia, *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J. Experimental Psychology: General 38 (1987); Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 Law & Human Behavior 317 (1986); Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in *Children's Eyewitness Memory* 53 (S. Ceci, M. Toglia & D. Ross eds. 1987); M. Zaragoza & D. Wilson, *Suggestibility of the Child Witness* (Paper presented at the Society for Research on Child Development, April, 1989).

32. Clark-Stewart, Thompson, & Lepone, *Manipulating Children's Testimony Through Interrogation*, in *Can Children Provide Accurate Eyewitness Testimony?* (G. Goodman, Chair, Society for Research in Child Development, 1989).

33. Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press); Rudy & Goodman, *Effects of Participation on Children's Testimony* (Submitted for publication 1989).

responding "yes" to the question, "He took your clothes off, didn't he?") than do older children.<sup>34</sup>

Relatively few studies of three-year-old's suggestibility exist, and research discloses no published studies on suggestibility of two-and-a-half-year-old children. When a brief story is read to children, or children view a brief slide sequence, some studies have shown three-year-olds to be more suggestible than older children.<sup>35</sup> Other studies have been unable to replicate these effects, however, calling them into question.<sup>36</sup> When children are exposed to real-life events and then questioned, three- and four-year-olds vary considerably in their abilities, with some three- and four-year-olds being resistant to leading questions concerning abuse and some being suggestible.<sup>37</sup> When three- and four-year-olds are suggestible with regard to acts related to abuse (e.g., having their clothes removed, having their "private parts" touched), their suggestibility is typically limited to a nod of the head or saying "yes." In the studies, spontaneous and detailed comments, such as those made by the child in the present case (i.e., that her daddy "does do this with me, but he does it a lot more with my sister than with me." 775 P.2d at 1225), are typically (although not always) accurate, even when elicited in the context of leading questions.<sup>38</sup>

34. Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press); Rudy & Goodman, *Effects of Participation on Children's Testimony* (Submitted for publication 1989).

35. Ceci, Ross & Toglia, *Suggestibility of Children's Memory: Psycholegal Implications*, 116 J. Experimental Psychology: General 38 (1987).

36. Zaragoza, *Memory, Suggestibility, and Eyewitness Testimony in Children and Adults*, in *Children's Eyewitness Memory* 53 (S. Ceci, M. Toglia & D. Ross eds. 1987).

37. Goodman & Aman, *Children's Use of Anatomically Detailed Dolls to Recount an Event*, *Child Development* (in press); Goodman, Rudy, Bottoms & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press).

38. Rudy & Goodman, *Effects of Participation on Children's Testimony* (Submitted for publication, 1989).

Young children's suggestibility is influenced by their understanding of the words used in a question. When children do not know what the term "private parts" means, for example, some may nod their head "yes" when asked if their private parts were touched.<sup>39</sup> The physician in the present case established that the child knew what was meant by the term "pee-pee." 775 P.2d at 1225.

Although it is appropriate to be concerned about use of directive and leading questions during interviews, it is important to reiterate once again the developmental and psychological need in selected cases to use such questions with young children. Although studies to date indicate there is a risk of obtaining some false information as a result of using leading questions with young children, studies also indicate that there is a danger in not using leading questions. For example, when information of a sensitive or embarrassing nature is at issue, leading questions may be necessary to elicit information from children. A study by Saywitz and her colleagues makes this point clearly.<sup>40</sup> Seventy-two five- and seven-year-old girls experienced a medical examination by a pediatrician. As part of the examination, half the girls at each age received a visual inspection of the vaginal and anal areas, and half were checked for scoliosis by touching the spine. When the children were later questioned about the examination, they were first asked an open-ended question ("What happened?"), then asked to demonstrate what occurred using anatomically detailed dolls, and finally asked a set of leading questions, including whether their vaginal and anal areas had been touched. The majority of the children who had received the vaginal and anal examination revealed this part of the examination only when asked specific leading questions about it ("Did the doctor touch you there?"). The genital examination was usually not mentioned when open-ended questions or anatomical dolls were used. In contrast, when the children who had the scoliosis examination were asked leading questions about vaginal and anal touching, the vast majority

39. Goodman & Aman, *Children's Use of Anatomically Detailed Dolls to Recount an Event*, *Child Development* (in press).

40. K. Saywitz, G. Goodman, E. Nicholas & S. Moan, *Children's Memories of Genital Examinations: Implications for Cases of Sexual Assault* (Paper presented at the Society for Research on Child Development, April, 1989).



(92%) resisted the suggestion. However, three children (8%) provided a false "yes." In this study, the researchers found that the risk of obtaining a false report about genital touching when open-ended, doll-aided, and leading questions were used was one percent. However, the risk of children not disclosing the genital inspection was much greater (64%). For most children, the genital examination was revealed only when leading questions were used. Thus, although there was a small danger of obtaining false information from children when leading questions were used, there was a much greater danger that potentially embarrassing information would not be revealed unless leading questions were used.

In the present case, the Idaho Supreme Court was concerned that the child might be especially subject to suggestive questions from the pediatrician because of the child's deference to his status as a doctor. 775 P.2d at 1228. Although there is some evidence in the scientific literature to suggest that children are more suggestible when interviewed by an authority figure,<sup>41</sup> there is also evidence to the contrary.<sup>42</sup>

It should also be noted that to the extent an authority figure might make a young child more suggestible, such results can be reversed by having the authority figure build rapport with the child. In one study, young children who experienced a stressful event as part of their regular health care (i.e., inoculations at a medical clinic) were later questioned by adults. Half of the children were interviewed by an adult who acted warm and friendly toward the child (e.g., smiled, complimented the child, gave the child cookies and juice), whereas the other half were interviewed by an adult who was more distant and cold (e.g., smiled infrequently, did not compliment the child, did not give the child cookies and juice). Three- to four-year-olds were substantially less suggestible when they were interviewed by the friendly adult. Of particular note, the children who were interviewed by the friendly adult were less suggestible on leading questions

41. Ceci, Ross & Toglia, *Suggestibility of Children's Memory: Psychological Implications*, 116 J. Experimental Psychology: General 38 (1987).

42. Brigham, VanVerst & Bothwell, *Accuracy of Children's Eyewitness Identifications in a Field Setting*, 7 Basic & Applied Social Psychology 295 (1986).

relevant to charges of child abuse (e.g., "How many times did she kiss you?" "You took your clothes off, didn't you?").<sup>43</sup> Thus, a doctor who establishes rapport with a child (as a doctor would be expected to do before performing a genital examination on a young child) might well have the effect of reducing the child's suggestibility, despite the fact that the doctor was an authority figure.

In summary, research findings are mixed on whether children are more suggestible when interviewed by an authority figure. To the extent that being interviewed by an authority figure increases children's suggestibility in regard to answers to leading questions about abuse, these effects can be reversed by being supportive of children.

The Idaho Supreme Court expressed concern that leading questions might so taint a child's memory that the child's description of sexual abuse would be unreliable. The lower court wrote that "[t]he problem of tainted memory is much more severe in young children. . . . Once this tainting of memory has occurred, the problem is irremediable." 775 P.2d at 1228. Contrary to the Idaho court's statement, research has not definitively demonstrated that memory can be so tainted by misleading information that accurate memory can never again be reinstated. Some studies have suggested that once a person accepts misleading information, the person's memory is forever tainted, although such studies do not examine memory for real-life events actually experienced by subjects.<sup>44</sup> Evidence concerning irreparable tainting is quite mixed, with some studies showing no permanent effects on memory of misleading information,<sup>45</sup>

43. B. Bottoms, G. Goodman, L. Rudy, L. Port, P. England, C. Aman & M. Wilson, *Children's Testimony for a Stressful Event: Improving Children's Reports* (Paper presented at the 97th Conference of the American Psychological Association, August, 1989); Goodman, Rudy, Bottoms, & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds., in press).

44. E. Loftus, *Eyewitness Testimony* (1979).

45. Bekerian & Bowers, *Eyewitness Testimony: Were We Misled?*, 9 J. Experimental Psychology: Learning, Memory, and Cognition 139 (1983); Lindsay & Johnson, *The Eyewitness Suggestibility Effect and Memory for Source*, Memory & Cognition (in press); McCloskey & Zaragoza, *Misleading Postevent Information and Memory for Events: Arguments and Evidence Against Memory Impairment*



and other studies indicating the possibility of more permanent tainting.<sup>46</sup> Research is inconsistent on whether children who initially accept misleading information about an event are likely to recall the inaccurate information later, when they describe the event.<sup>47</sup> Although it is possible that leading questions can permanently taint memory, the Idaho court exaggerated the certainty of this conclusion.

In the present case, the Idaho court quotes at length from the testimony of a child psychologist who testified for the defendant at trial. At one point, the psychologist contended that children's responses can be easily "shaped." The psychologist went on to state that "one of my colleagues in the Portland area, Bill McGeiver has found that simply by nodding the head and saying "um-hum" he can shape, so to speak, gradually shape behaviors in young children that border on the sexually bizarre." 775 P.2d at 1229. *Amici* would point out that it is unclear from the Idaho court's decision what the defense psychologist meant by behaviors that "border on the sexually bizarre." *Id.* Furthermore, the defense psychologist does not state whether Mr. McGeiver's findings were based on research, or were merely his clinical observations of a few children. Finally, the defense expert provides no clue regarding Mr. McGeiver's credentials. It is clear that the McGeiver findings are not to be found in the scientific literature. *Amici* know of no scientific studies indicating that children or adults can be "shaped" by nodding of the head and saying "um-hum" to make false claims of sexual abuse.

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*Hypotheses*, 114 J. Experimental Psychology: General 3 (1985); Zaragoza, McClosky & Jamis, *Misleading Postevent Information and Recall of the Original Event: Further Evidence Against the Memory Impairment Hypothesis*, 13 J. Experimental Psychology: Learning, Memory, and Cognition 36 (1987).

46. Ceci, Ross & Toglia, *Suggestibility of Children's Memory: Psychological Implications*, 116 J. Experimental Psychology: General 38 (1987); E. Loftus, *Eyewitness Testimony* (1979); Tversky & Tuchin, *A Reconciliation of the Evidence on Eyewitness Testimony: Comments on McCloskey and Zaragoza*, 118 J. Experimental Psychology: General 86 (1989).

47. Clark-Stewart, Thompson & Lepone, *Manipulating Children's Testimony Through Interrogation*, in *Can Children Provide Accurate Eyewitness Testimony?* (G. Goodman, Chair, Society for Research in Child Development 1989); Goodman & Reed, *Age Differences in Eyewitness Testimony*, 10 Law & Human Behavior 317 (1986).

### C. Differentiating Fact and Fantasy

Are children so prone to confuse fantasy and reality that their descriptions of events are unreliable? In the instant case, the psychologist testifying for the defense stated that "children who have a mental age of five years and chronological age of five years would have difficulty distinguishing fantasy from reality." 775 P.2d at 1128. The psychologist's statement is not born out by the scientific literature. Some developmental theorists, including Freud and Piaget, have suggested that children routinely confuse reality with fantasy, but researchers have not found evidence to support these claims. Experimental work does not bear out Freud's notion of infantile hallucination or Piaget's belief that children are so egocentric that they routinely fail to distinguish reality from fantasy. Moreover, although children like to use pretend in their play, they seem to know when they are pretending. Thus, the defense psychologist erred when he opined that children cannot distinguish what is real from what is imagined. Modern research suggests that children are less likely than adults to differentiate fact from fantasy in some situations, but not others.

Researchers have examined children's and adults' ability to discriminate between fresh memories of an event itself, memories of one's later thoughts about the event, and memories of what other people have said about the event. Johnson and her colleagues report that children (six-year-olds) show a deficit in some of these areas, but not in others.<sup>48</sup> In Johnson's studies, children were no more confused than adults when asked to discriminate what they saw someone else do or say from what they themselves did or said. Children were not more likely than adults to confuse memories of what two other people did or said. In other words, children accurately remembered who said and did what. When considering the aspects of Johnson's studies that are most relevant to children's ability to distinguish fact from fantasy

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48. Johnson & Foley, *Differentiating Fact from Fantasy: The Reliability of Children's Memory*, 40 J. Social Issues 33 (1984); Lindsay & Johnson, *Reality Monitoring and Suggestibility: Children's Ability to Discriminate Among Memories From Different Sources*, in *Children's Eyewitness Memory* 92 (S. Ceci, M. Toglia & L. Ross eds. 1987).

during child abuse interviews, the children did not have difficulty making the distinction. However, six-year-olds did have more difficulty than adults in discriminating memories of what they themselves had said or done from what they had only imagined themselves saying or doing. Although adults also showed confusion on this task, children did so to a greater extent.

Johnson notes that the relevance of any of these findings for children's testimony may be limited by the fact that the stimuli used in the experiments were artificial (i.e., imagining a picture of an object), and were not embedded in a context that was meaningful to children's lives. Children's understanding and memory of events is considerably improved when the events are meaningfully embedded in their lives.<sup>49</sup> In contrast to the artificial stimuli used by Johnson, crimes that children experience, such as sexual assault, are likely to be compelling, vivid, important, and embedded within the children's lives.

Johnson's research on children's ability to differentiate imagined from experienced events did not include children as young as two-and-a-half years of age. It is possible that such children may have a greater deficit in the ability to distinguish fantasy from reality. The relevant studies remain to be done.

In discussing children's ability to distinguish fantasy from reality, it is not accurate to suggest, as the defense expert did in this case, that children have special difficulty in remembering actions correctly. 775 P.2d at 1228. A number of studies indicate that children's memory is particularly strong for actions.<sup>50</sup>

A final aspect of children's ability to distinguish fact from fantasy relates to the possibility that a young child could fabricate a report of

49. M. Donaldson, *Children's Minds* (1978); K. Nelson, *Event Knowledge: Structure and Function in Development* (1986).

50. Fivush, Gray & Fromhoff, *Two-Year-Olds Talk About the Past*, 2 Cognitive Development 393 (1987); Goodman, Aman & Hirschman, *Child Sexual and Physical Abuse: Children's Testimony*, in *Children's Eyewitness Memory* 1 (S. Ceci, M. Toglia & D. Ross eds. 1987); Jones, Swift & Johnson, *Nondeliberate Memory for a Novel Event Among Preschoolers*, 24 Developmental Psychology 641 (1988).

sexual abuse. It should be noted that young children have little accurate knowledge of adult sexual activities and reproduction.<sup>51</sup> Moreover, several studies have demonstrated that even under conditions of leading questioning, young children are not prone to sexual fantasy.<sup>52</sup> Although young children (e.g., three-year-olds) may at times indicate an affirmative answer to a leading question (e.g., shake their heads or say "yes"), most children have not been found to elaborate on their simple "yes" answers, or to fabricate detailed accounts of sexual abuse in response to such questions.

Even young children are capable of intentionally lying and misstating reality. However, intentional lying generally occurs in young children in order to avoid punishment. Moreover, unlike older children, young children tend to be unconvincing liars, and adults can often detect young children's falsehoods.<sup>53</sup> Unless young children have been personally or vicariously exposed to adult sexual activity, they do not possess the knowledge to fabricate descriptions of such activity.

The child development literature indicates that young children possess the capacity to remember and relate events. Furthermore, although young children are more suggestible than adults in some circumstances, children are not as suggestible as many adults believe, and in some studies young children are quite resistant to suggestive and misleading questioning. Finally, children can usually differentiate the real from the imaginary.

Children, like adults, can be misled by leading and suggestive questions, and professionals who interview young children should

51. R. Goldman & J. Goldman, *Show Me Yours: Understanding Children's Sexuality* (1988); R. Goldman & J. Goldman, *Children's Sexual Thinking* (1982).

52. Goodman & Aman, *Children's Use of Anatomically Detailed Dolls to Recount an Event*, Child Development (in press); Goodman, Rudy, Bottoms, & Aman, *Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony*, in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds., in press).

53. DePaulo, Stone & Lassiter, *Deceiving and Detecting Deceit*, in *The Self and Social Life* (B. Sclenker ed. 1985).



use such questions sparingly and with caution. In some cases, however, highly directive questioning is required to enable traumatized and frightened children to describe events. As the number of directive and leading questions rises, so does concern about the reliability of a child's out-of-court statements. Thus, when assessing the reliability of a child's statements, it is appropriate to examine the types of questions asked during the interview. This is not to say, however, that the use of leading questions indicates unreliability. Many statements in response to leading questions are trustworthy. Thus, as was the case with videotaping, presence or absence of leading questions is but one of many factors considered in analyzing the reliability of children's out-of-court statements.

### III. MOST PROFESSIONALS BELIEVE THAT INTERVIEWERS SHOULD POSSESS BACKGROUND INFORMATION ABOUT A CASE BEFORE INTERVIEWING A CHILD

The prevailing practice among professionals who interview sexually abused children is to obtain information about the child and the possibility of sexual abuse before conducting the interview. This practice is consistent with the long tradition in medicine, psychiatry, psychology, and social work of obtaining a medical, developmental, or family history before examining or treating a patient.

In the instant case, the Idaho Supreme Court concluded that the child's statements to the interviewing pediatrician lacked trustworthiness because the doctor had a "preconceived idea of what the child should be disclosing." 775 P.2d at 1227. That is, because the doctor knew the child may have been sexually abused, the interview necessarily produced unreliable information. With all due respect for the lower court, *Amici* urge this Court to reject the conclusion that prior knowledge of a child's circumstances undermines a professional's ability to elicit trustworthy information from the child. It is true that interviewers should not entertain general preconceptions such as "children never lie about sexual abuse." There is an important distinction, however, between preconceptions that can cloud judgment, and background information that is needed for a thorough evaluation of possible abuse.

Given that at least mildly leading questions are often necessary with young children, interviewers must know something about the alleged abuse in order to frame meaningful questions. Young children cannot be expected to understand the purpose of an interview. Unlike an adult rape victim, who understands the context and meaning of a question such as "What happened?", young children often have no idea of the purpose of the interview or the topic of interest until it is introduced by the interviewer through specific questions.

The substantial majority of professionals who work with sexually abused children believe that, in the discretion of the professional, it is proper to obtain relevant background information before interviewing children. Interviewers perform more effectively when they are armed with relevant information.

### IV. THE COURT SHOULD REAFFIRM THE TOTALITY OF THE CIRCUMSTANCES APPROACH TO RELIABILITY USED BY FEDERAL AND STATE COURTS TO ASSESS THE RELIABILITY OF CHILDREN'S HEARSAY STATEMENTS OFFERED UNDER THE RESIDUAL AND CHILD HEARSAY EXCEPTIONS

During the 1980s, Federal and State courts grappled with the difficult task of assessing the reliability of children's hearsay statements offered under the residual and child hearsay exceptions. The uniform approach of the courts is to consider all circumstances that bear on trustworthiness. The following factors, among others, are discussed in the cases, and provide an adequate basis for assessing the reliability of children's hearsay statements.<sup>54</sup>

54. Professor Graham provides a thorough analysis of factors relating to reliability. See Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 Minn. L. Rev. 523 (1988), where the author writes:

Courts consider several criteria in evaluating the trustworthiness of a hearsay statement, including the credibility of the statement and the declarant at the time of the statement in light of the declarant's personal knowledge, the availability of time



If the content of a child's hearsay statement is supported by other evidence, the reliability of the statement may be bolstered. *State v. Allen*, 157 Ariz. 165, 755 P.2d 1153, 1164 (1988). In some cases, an eyewitness corroborates the child's statement. *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 812 (1987). In others, medical evidence supports the statement. *People v. District Court*, 776 P.2d 1083, 1090 (Colo. 1989). The fact that a child's statement is overheard by more than one person may enhance the reliability of the statement. *State v. Cooley*, 48 Wash. App. 286, 738 P.2d 705 (1987).

Courts view the spontaneity of a child's statement as an important indicator of reliability. The more spontaneous the statement, the less likely it is to be fabricated. *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987). Reliability is also enhanced when a child repeats an out-of-court statement more than once, and when each version is consistent. *United States v. Cree*, 778 F.2d 474, 477 n.5 (8th Cir. 1985); *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801, 811 (1987); *State v. Kuone*, 243 Kan. 218, 757 P.2d 289, 292 (1988). When a child is inconsistent, doubts arise about trustworthiness. This is not to say, however, that complete consistency is required. Young children are often inconsistent regarding peripheral details of events they have experienced. What is more important is consistency regarding core aspects of events.

The reliability of a hearsay statement can be influenced by questioning during interviews and in other situations. When a

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to fabricate, the declarant's bias, and the suggestiveness created by leading questions. Courts further consider other, corroborating factors arising after the statement was made, including the credibility of the person testifying to the statement, the availability of the declarant at trial for cross-examination . . . , whether the declarant has recanted or reaffirmed the statement, and the existence of corroborating physical evidence. In child sexual abuse cases, courts should also consider whether the child's statement discloses an embarrassing event that a child would not normally relate unless true, is a cry for help, employs appropriate childlike language, or describes a sexual act beyond a child's normal experience. Also relevant are the child's age and maturity, the nature and duration of the sexual contact, the child's physical and mental condition when the statement was made, and the relationship of the child and the accused.

*Id.* at 532-33 (footnotes omitted).

statement is made in response to questioning, especially leading questioning, the possibility arises that the questioner influenced the statement. However, directed and even leading questions do not *ipso facto* destroy trustworthiness. The fact that a child's statement was made in response to questioning is a relevant consideration, but should not be considered a litmus test for reliability.

Numerous courts and commentators observe that young children lack the experience to fabricate detailed and anatomically accurate accounts of sexual acts. When a child's out-of-court statement describes an event which a child of similar age and experience could not reasonably be expected to fabricate, the statement gains in reliability. *Morgan v. Foretich*, 846 F.2d 941, 948 (4th Cir. 1988)(discussing excited utterance exception); *State v. D.R.*, 109 N.J. 348, 537 A.2d 667, 673 (1988); *State v. Sorenson*, 143 Wis.2d 266, 421 N.W.2d 77, 85, 87 (1988). Reliability is enhanced when a child describes sexual abuse in terminology one would expect from a child of similar age. *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77, 85 (1988).

Evidence that a child had no motive to fabricate at the time an out-of-court statement was made supports reliability. *State v. Kuone*, 243 Kan. 218, 757 P.2d 289, 292-93 (1988); *State v. J.C.E.*, 767 P.2d 309, 315 (Mont. 1988). An adult with custody or control of a child may bear a grudge against another adult, and may attempt to coach a child into making false charges of abuse. Thus, evidence of adult incentive to fabricate, or the lack thereof, is relevant. *State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1988).

The fact that the defendant had the opportunity to commit the act described in a child's statement may increase the trustworthiness of the statement. *State v. Sorenson*, 143 Wis.2d 226, 421 N.W.2d 77, 85 (1988).

The foregoing factors are among the many indicia of reliability discussed in Federal and State court decisions discussing the trustworthiness of children's hearsay statements offered under the residual and child hearsay exceptions. *Amici* respectfully urge the Court to endorse the totality of the circumstances approach now in general use, and to eschew an approach that establishes a small

number of factors as litmus tests for reliability. The totality of the circumstances approach works well in practice, and protects defendants against unreliable hearsay evidence.

### CONCLUSION

When considering the trustworthiness of children's hearsay statements offered under residual and child hearsay exceptions, courts should consider all factors that bear on reliability, and should eschew reliance on a small number of factors that may lead to exclusion of reliable and important evidence.

Respectfully submitted,

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Supreme Court, U.S.

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In The  
**Supreme Court of the United States**  
October Term, 1989

The State of Idaho, *Petitioner*

v.

Laura Lee Wright, *Respondent*

On Writ of Certiorari to  
The Supreme Court of Idaho

Brief Of Amicus Curiae  
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## QUESTION PRESENTED FOR REVIEW

Whether the "indicia of reliability" and "particularized guarantees of trustworthiness" mandated by the Sixth Amendment Confrontation clause of the United States Constitution require that the hearsay statement of a very young victim of sexual abuse to an examining pediatrician be excluded unless the prosecution establishes that (a) the interview was either audio or video-taped; (b) leading questions were not used; and (3) the examining pediatrician conducting the interview did not have any preconceived idea of what the child should be disclosing.

(i)

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INTERESTS OF AMICI

Amici curiae are States, each of which recognizes the important public policy interests served by prosecuting those who sexually abuse children. The States have a compelling interest, as well, in protecting child witnesses. Thirty States have reflected that interest, either by enacting statutes specifically designed to admit the hearsay declarations of certain child victims, or by allowing such testimony, through the use of other hearsay exceptions established by rule or by case law. (See Appendix where the state statutes and rules are set forth at length). By these solutions, the States have attained the delicate constitutional balance necessary to achieve justice for both the child victims and the defendants in these prosecutions.

The decision of the Supreme Court of Idaho requires the taping of child victim interviews, forbids the use of leading questions, and denies the interviewer access to background information which might disclose the abuse. These requirements, if affirmed by this Court, would invalidate the States' varied responses to this difficult issue, for none of their responses meet the Idaho court's restrictive criteria. The amici States accordingly support Idaho in urging reversal of the Idaho Supreme Court.

#### SUMMARY OF ARGUMENT

The Sixth Amendment's Confrontation Clause, applicable to the States by the Fourteenth Amendment, does not prohibit the use at a criminal trial of all hearsay statements. Consideration of public policy and the necessities of certain criminal prosecutions sometimes require the introduction of these statements.

The States have strong public policies in successfully prosecuting sexual abusers of children and in protecting the child victims of these abusers. Without rules allowing for the admission at trial of the out-of-court statements of these child victims, these strong public policies will be defeated.

In balancing an accused's Confrontation Clause rights against the States'



interests in child molestation cases, the accused's rights must yield where the hearsay statements of child sexual abuse victims possess particularized guarantees of trustworthiness. Such guarantees are sufficient to protect the rights of the accused.

Thirty States have adopted rules allowing for the use of out-of-court statements by child sex abuse victims where the trial judge, after hearing, determines that the statements are trustworthy or reliable. These rules satisfy the requirements of this Court needed to overcome a Confrontation Clause hearsay challenge. To abrogate these rules, or to make them so restrictive as to make them useless as did the court below, will defeat the States' strong interests in this area. Hearsay statements of child sexual abuse

victims, necessary to the successful prosecution of sexual abusers of children, do not run afoul of the Confrontation Clause when they possess particularized guarantees of trustworthiness as required by the rules of the several States. This Court should so hold.

### ARGUMENT

The Confrontation Clause Does Not Prohibit The Introduction Of Hearsay Statements Of Child Sexual Abuse Victims Where The Statements Possess Guarantees of Trustworthiness.

In this case the Court must again consider "the relationship between the Confrontation Clause and the hearsay rule with its many exceptions." Ohio v. Roberts, 448 U.S. 56, 62 (1980). Though "[t]he Court in Roberts remained '[c]onvinced that "no rule will perfectly resolve all possible problems"' and rejected the 'invitation to overrule a near-century of jurisprudence' in order to create such a rule, 448 U.S. at 68, n.9," United States v. Inadi, 475 U.S. 387, 392 (1986), it is Roberts which provides the analytical framework for resolution of the instant case.

The Roberts Court, after rejecting a literal reading of the Confrontation

Clause which "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme," conceded "that the clause was intended to exclude some hearsay." Roberts, supra, 448 U.S., at 63. The Court recognized, however, that competing interests--"considerations of public policy and the necessities of the case"--sometimes warranted dispensing with confrontation at trial. Id., at 64. The "interests" identified by the Court in Roberts were each state's "strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings." Id. In resolving the several cases which called into question "the relationship between the confrontation clause and the hearsay rule"

the Court "has sought to accommodate these competing interests." Id., at 64. See also Coy v. Iowa, 487 U.S. \_\_\_, \_\_\_, 108 S.Ct. 2798, 2803 (1988). The process of deciding these cases "has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions." Roberts, supra, 448 U.S., at 64.

In the case sub judice the Court must consider the relationship between the Confrontation Clause and an exception to the hearsay rule permitting admission of out-of-court statements of child sexual abuse complainants. Building on past decisions, drawing on new experience, and responding to changing conditions, the Court should hold that such a rule withstands a Confrontation Clause challenge.

In recent years, the sexual abuse of children has become a serious national problem. See Coy v. Iowa, 487 U.S., at \_\_\_, 108 S.Ct., at 2803-2804 (O'Connor, J., concurring). The States have responded resoundingly to this problem. In order to forward their strong interests in enforcing the laws against child sexual abusers and in developing the rules of evidence applicable in criminal proceedings, thirty States have adopted rules of evidence allowing for the admission of the out-of-court statements of these child victims provided they possess the "particularized guarantees of trustworthiness," Ohio v. Roberts, 448 U.S., at 66, needed to satisfy the Confrontation Clause. While the rules vary somewhat they uniformly require findings that the statements have "indicia of



reliability" or are trustworthy before they may be admitted. See, e.g., 42 Pa. Cons. Stat. Ann. § 5985.1 (1990 Pa. Legis. Serv. Act 100 (Purdon)). See also Coy v. Iowa, 487 U.S., at \_\_\_, 108 S.Ct., at 2805 (O'Connor, J., concurring) ("if a court makes a case specific finding of necessity, as is required by a number of state statutes.

. . . our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest in protecting child witnesses.") These rules have been implemented by legislation,<sup>1</sup> evi-

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<sup>1</sup>Alaska Code of Criminal Procedure § 12.40.110 (1985); 13 Ariz. Rev. Stat. Ann. § 1416 (Supp. 1987); Col. Rev. Stat. § 13-25-129 (1987); Fla. Stat. § 90.803(23) (Supp. 1988); Ga. Code Ann. § 24-3-16; Idaho Code 19-3024 (1987); Ill. (footnote continued on next page)

dentiary rules,<sup>2</sup> or by case law.<sup>3</sup>

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<sup>1</sup>(continued) Ann. Stat. ch. 38, para. 115-10 (Smith-Hurd 1988 Supp); Ind. Code 35-37-4-6 (1988); Kan Stat. Ann. § 60-460 (dd) (1983); Ky. Rev. Stat. Ann. § 421.355 (1986) (declared unconstitutional on state law grounds *Drumm v. Commonwealth*, No. 87-8C-848 MR (Ky filed Jan 18, 1990) (1990 Ky. Lexis 3); Me Rev. Stat Ann. tit 15, § 1205 (1988 Supp.); Md. Cts. Jud. Proc. Code Ann. § 9-103.1 (1988 Supp.); Minn Stat. Ann. § 595.02(3) (West 1988); Mo. Rev. Stat. § 491.075 (1988); Nev. Rev. Stat. Ann. § 51.385 (1986, Supp. 1988); Okla. Stat. Ann. tit. 12, § 2803.1 (West Supp. 1987); Or. Rev. Stat. § 40.460 (1989); 42 Pa.Cons.Stat.Ann. § 5985.1 (1990 Pa. Legis. Serv. Act 100 (Purdon)); S.D. Codified Laws Ann. § 19-16-38 (1987); Tex Code Crim.Proc.Ann. art. 38.072 (Vernon 1985); Utah Code Ann. § 76-5-411(1) (1985); Wash. Rev. Code § 9A.44.120 (1988). These rules are set forth at length in the Appendix.

<sup>2</sup>Ark. R. Evid. 803 (25)(a); Cal. Evid. Code S 1228 (West 1985); 67 (footnote continued on next page)

<sup>3</sup>Courts have allowed out-of-court declarations of child victims under (footnote continued on next page)

The States have recognized the oftentimes impossible task of bringing

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<sup>2</sup>(continued) Michigan Bar J. 68 (July 1988) (proposed); Miss. R. 803(25) (proposed); N.J. Evid. R. 63 (33); N.D.R. 803 (24) (eff. 3/1/90); Vt. R.E. 804(9) (Supp. 1988). These statutes are set forth at length in the Appendix.

<sup>3</sup>(continued) firmly rooted exceptions to the hearsay rule. The Supreme Court of Idaho recognized the admissibility of such declarations when they are "excited utterances" or part of the res gestae. See State v. Wright, 116 Idaho 382, \_\_\_, 775 P.2d 1224, 1230-1231 (1989) cert. granted sub nom. Idaho v. Wright, \_\_\_ U.S. \_\_\_, 110 S.Ct. 833 (1990) (collecting cases). Courts have also admitted such statements when made for the purposes of medical diagnosis or treatment under state rules similar to Fed. R. Evid. 803(4). See e.g., State v. Robinson, 153 Ariz 191, 735 P.2d 801 (1987); People v. Galloway, 726 P.2d 249 (Colo. App. 1986); Drumm v. Commonwealth, No. 87-86-848 MR (Ky. filed Jan. 18, 1990) (1990 Ky Lexis 3); State v. Olesen, 443 N.W. 2d 8 (S.D. 1989); State v. Nelson, 138 Wis.2d 418, 406 N.W. 2d 385 (1987); Goldade v. State, 674 P.2d 721 (Wyo 1983), cert. denied, sub nom. Goldade v. Wyoming, 467 U.S. 1253 (1984).

Many States now recognize an (footnote continued on next page)

sexual abusers of children to book and have responded by adopting rules of evidence that are necessary to successful prosecution of these cases while, at the same time, fulfilling the requirements of the Confrontation Clause. These rules promote the compelling state interest in the physical and psychological well-being of children which this Court has historically stressed. See New York v. Ferber, 458 U.S. 747 (1982); and Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

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<sup>3</sup>(continued) exception to the hearsay rule patterned after Fed.R.Evid. 803(24), often called the "residual" exception. Child victims hearsay statements have been found admissible under such an exception. See e.g. State v. Robinson, 153 Ariz. 191, 735 P.2d 801 (1987); Oldsen v. People, 732 P.2d 1132 (Colo. 1986); State v. Deanes, 323 N.C. 508, 374 S.E. 2d 249 (1988), cert. denied sub nom. Deanes v. North Carolina, \_\_\_ U.S. \_\_\_, 109 S.Ct. 2455 (1989).

See also Coy v. Iowa, 487 U.S., at \_\_\_, 108 S.Ct., at 2805 (O'Connor, J., concurring) ("The protection of child witnesses is, in my view and in the view of a substantial majority of the States [an important public] policy.").

The strong public policy of effective enforcement of the States' child sexual abuse laws necessitates this exception to the hearsay rule. The child victims of sexual abuse are often unavailable to testify because of their age, or because of the trauma resulting from the very crimes that have been committed upon them. The defendant who picks these vulnerable people as victims should not benefit from his or her misconduct. As the Court of Appeals for the Seventh Circuit observed, "how ironic it would be if the child molester could use the trauma inflicted on his

victim as the fulcrum for leveraging his way to freedom." Nelson v. Farrey, 874 F.2d 1222, 1230 (7th Cir. 1989), cert. denied, \_\_\_ U.S. \_\_\_, 110 S.Ct. 835 (1990).

In many child abuse cases, confrontation is impossible due to the actions of the accused, the person asserting the right. Such a defendant should not benefit from abusing a child, just as the law does not allow a defendant to benefit from murdering a witness against him, absenting himself from trial, or engaging in contumacious conduct in a courtroom. Taylor v. United States, 414 U.S. 17 (1973); Illinois v. Allen, 397 U.S. 337 (1970); and United States v. Thevis, 665 F.2d 616 (5th Cir. 1982). Voiding these state rules of evidence will have that effect.



These public policy concerns have been well-stated by the intermediate appellate court of Minnesota in upholding a state statute in the face of a Confrontation Clause challenge. The court said:

The Minnesota legislature has enacted a statute in order to extend the circumstances in which hearsay testimony of child abuse victims is admissible, consistent with the constitutional guarantees incorporated into the statute. The legislature did not want to allow child abusers to escape conviction merely by choosing victims who, due to their age or otherwise, are unavailable to testify at trial.

State v. Bellotti, 383 N.W.2d 308, 316 (Minn. App. 1986).

The States have responded to this problem in a logical and intelligent manner. They have utilized established

legal methods to address the phenomenon of sexual abuse of children by building on past decisions of this Court. The responses have ensured that the hearsay statements of these sexually abused child victims possess the particularized guarantees of trustworthiness which this Court has said are necessary to overcome any Confrontation Clause hearsay challenge. See Coy v. Iowa, 487 U.S., at \_\_\_, 108 S.Ct., at 2803. With the exception of the Supreme Court of Idaho,<sup>4</sup> every court which has addressed such a challenge has rejected it, relying on this Court's opinions in Ohio v. Roberts, supra, and United States v.

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<sup>4</sup>State v. Wright, 116 Idaho 383, 775 P.2d 1224 (1989), cert. granted sub nom. Idaho v. Wright, \_\_\_ U.S. \_\_\_, 110 S.Ct. 833 (1990).

Inadi, supra.<sup>5</sup> Legislators and judges have recognized the necessity of

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<sup>5</sup>See e.g., State v. Robinson, 153 Ariz. 191 735 P.2d 801 (1987), (although the statute was violative of state separation of powers doctrine, it did not violate Confrontation Clause; moreover, the statements were still admissible under other exceptions to hearsay rule); Johnson v. State, 292 Ark. 632, 732 S.W.2d 817 (1987) (upholding rule of evidence against Confrontation Clause challenge); People v. Galloway, 726 P.2d 249 (Colo. App. 1986) (upholding statutory hearsay exception against challenge based on Confrontation Clause in case where child victim testified at trial); Perez v. State, 536 So.2d. 206 (Fla. 1988), cert. denied, sub. nom. Perez v. Florida \_\_\_ U.S. \_\_\_, 109 S.Ct. 3253 (1989) (upholding statutory hearsay exception for certain statements of child victims of sexual abuse where victim was unavailable as a witness and where Confrontation Clause challenge to evidence was made); Sosebee v. State, 257 Ga. 298, 357 S.E.2d 562 (1987) (upholding against Confrontation Clause challenge a statutory hearsay exception which required the victim's availability to testify); People v. Boastick, 140 Ill. App. 3d 78, 94 Ill. Dec. 500, 488 N.E.2d 326 (1986) (upholding statutory exception in factual setting where (footnote continued on next page)

providing answers to the problem of children so traumatized by the criminal act of abuse that they are unable to testify against their abusers. The responses have been constitutional as a review of the state rules and decisions upholding them in the face of Confrontation Clause challenges demonstrates.

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<sup>5</sup>(continued) victim testified); State v. Myatt, 237 Kan 17, 697 P.2d 836 (1985) (upholding statutory hearsay exception where victim was disqualified as witness); State v. Bellotti, 383 N.W. 2d 308 (Minn. App. 1986) (same); State v. Wright, 751 S.W. 2d 48 (Mo. 1988) (upholding statute against a Confrontation Clause challenge); Buckley v. State, 758 S.W.2d 339 (Tex. App. Texarkana 1988), petition for discretionary review denied, and Holland v. State, 770 S.W.2d (Tex. App. Austin 1989) petition for discretionary review denied, (same); State v. Nelson, 72 Utah Adv. Rep. 15, 725 P.2d 1353 (1986) (same); State v. Gallagher, 150 Vt. 341, 554 A.2d 221 (1988) (same); State v. John Doe, 105 Wash 2d. 889, 719 P.2d 554 (1986) (same).

Taking its cue from this Court's decision in Ohio v. Roberts, Kansas, for example, adopted a rule of evidence allowing a child crime victim's hearsay statements if "the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises. . ." Kan.Stat.Ann. § 60-460(dd) (1983 Supp. 1988); Appendix pp. 13-14. Rejecting a challenge based upon the Confrontation Clause, the Kansas Supreme Court found the evidentiary rule to fully comply with this Court's dictates in Roberts: a judicial determination of unavailability and particularized guarantees of trustworthiness, required since the statute was not a firmly rooted hearsay

exception. State v. Myatt, 237 Kan. 17, \_\_\_, 697 P.2d 836, 843 (1985).

The Court in Myatt reflected upon the necessity of the hearsay statements at trial. The child victim's out-of-court statements often constitute the only proof of the crime of sexual abuse. The offender is usually a relative or close acquaintance who has the opportunity to be alone with victim. Witnesses are rare, as people ordinarily do not molest children in front of others. Corroborating physical evidence may be absent or inconclusive. For many reasons, the child may be unable to testify at trial. Id., at 841.

Of trustworthiness, the Kansas Court stated:

The determination of reliability and trustworthiness must be made on a case-by-case basis. Such



factors as the age of the child; his or her physical and mental condition; the circumstances of the alleged event; the language used by the child; the presence of corroborative physical evidence; the relationship of the accused to the child; the child's family, school, and peer relationships; any motive to falsify or distort the event; and the reliability of the testifying witness can be examined. See, e.g., United States v. Nick, 604 F.2d 1199 (9th Cir. 1979); State v. Rodriguez, 8 Kan. App.2d at 355-57, 657 P.2d 79. Contrary to the defendant's argument, the statute does not allow admission of the hearsay statements of a child victim for the sole reason that the statement was made by a child.

Id. (Emphasis supplied).

While corroborative physical evidence is but one factor in a trustworthiness determination in Kansas, Minnesota requires corroborative evidence where the child is unavailable

to testify. Minn. Stat. Ann. § 595.02(3)(b)(ii); Appendix pp. 20-21. The Minnesota statute withstood a constitutional challenge based upon the Confrontation Clause in State v. Bellotti, 383 N.W.2d 308 (Minn. App. 1986).

There were two child victims in the Bellotti case--one who testified, and one who did not. Both children were females, and each was four years old. The child who testified did so after the court found ten indicia of reliability in a hearing outside the presence of the jury.

As to hearsay statements of T.C. (the child who testified) about assaults on the other child, C.B., the court admitted them under Minn.R.Evid. 803 (24), the residual hearsay exception, applying the same indicia of reliability

used to admit T.C.'s statements about the assault on herself. Because T.C. testified and was available for cross-examination, the court said no confrontation right was implicated, citing California v. Green, 399 U.S. 149, 158 (1970).

As to C.B.'s out-of-court statements, since C.B. did not testify due to a finding of incompetency, and, therefore, unavailability, not only were the indicia of reliability necessary, of which the court found seven, but the necessary independent corroboration was found in T.C.'s direct testimony and defendant's partial confession.

Florida also mandates a showing of "corroborative evidence of the abuse or offense" where the child hearsay declarant is unavailable as a witness. Fla.Stat. § 90.803(23)(9) 2 b (West

Supp. 1989), Appendix pp. 7-8. Upholding the statute, the Florida Supreme Court in Perez v. State, 536 So.2d 206 (1988), cert.denied, sub nom. Perez v. Florida, \_\_\_ U.S. \_\_\_, 109 S.Ct. 3253 (1989), found the statute:

follows the general approach set forth by the United States Supreme Court in Ohio v. Roberts. . . . [T]he statute provides that before the out-of-court statements of the child victim may be admitted the court must first find, in a hearing, that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability." Secondly, the child victim must either testify or be unavailable as a witness. If the child testifies, the defendant has been afforded an opportunity to confront the hearsay declarant. See California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). If the child victim does not testify, section 90.803(23) requires, in addition to a

determination that the child is unavailable, "other corroborative evidence of the abuse or offense," which provides particularized guarantees of trustworthiness.

— Fla. —, —, 536 So.2d 206, 209.

The Florida statute suggests that the court consider "the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate" in determination of the "sufficient safeguards of reliability" to allow the proffered hearsay. Fla. Stat. § 90.803 23(a)(1)(West Supp. 1989). These factors which are not an "exhaustive list of elements to be considered", Perez, supra at 210, must be supplemented by corroborative

evidence where the victim is unavailable.

These States,<sup>6</sup> along with Pennsylvania, have exercised their power to determine rules of evidence in criminal proceedings. Each permits introduction of hearsay declarations of child sexual abuse victims consistent with the defendant's Confrontation Clause rights as outlined by this Court.

The States have properly considered and resolved this serious national problem. These child hearsay rules

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<sup>6</sup>As well as others, see infra n. 1-3. A sample statute of the American Bar Association's National Legal Resource Center for Child Advocacy and Protection has served as the model for legislation in a number of States. The model statute was carefully drafted in accordance with this Court's mandates to afford the perpetrator his or her confrontation rights. "Protecting Child/Victim Witnesses", National Legal Resource Center for Child Advocacy and Protection, February, 1986, pp. 5-9, 82. Appendix, pp. 40-44.



properly balance the need for reliable testimony against the particular problems of the child witness and, by requiring that the out-of-court statements possess particularized guarantees of trustworthiness, satisfy the requirements of the Confrontation Clause. The Idaho Supreme Court applied this Court's prior decisions in too restrictive a fashion without giving due regard to the strong public policies here involved and to the necessities of these cases. Amici respectfully urge this Court to reverse the decision below.

### CONCLUSION

For the reasons stated above, amici curiae request that this Honorable Court reverse the judgment of the Supreme Court of Idaho.

Respectfully submitted,

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BY:

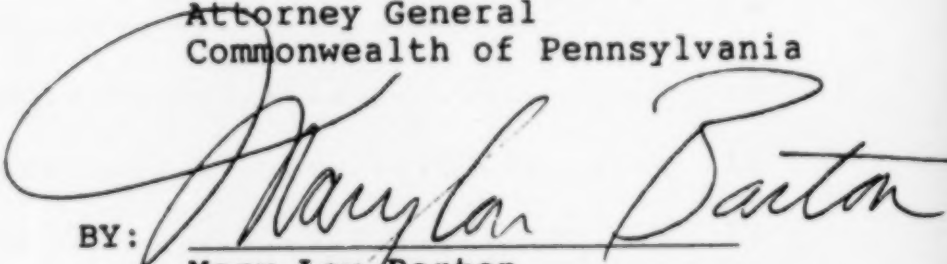
  
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## APPENDIX

**Alaska - Code of Criminal Procedure**  
 Sec. 12.40.110 Hearsay evidence in prosecutions for sexual offenses. (a) In a prosecution for an offense under AS 11.41.410--11.41.440 or 11.41.455, hearsay evidence of a statement related to the offense, not otherwise admissible, made by a child who is the victim of the offense may be admitted into evidence before the grand jury if

(1) the circumstances of the statement indicate its reliability;

(2) the child is under 10 years of age when the hearsay evidence is sought to be admitted;

(3) additional evidence is introduced to corroborate the statement; and

(4) the child testifies at the grand jury proceeding or the child will be available to testify at trial.

(b) In this section "statement" means an oral or written assertion or nonverbal conduct if the nonverbal conduct is intended as an assertion. (§ 1 ch 41 SLA 1985)

## Arizona - Criminal Code Title 13

§ 13-1416. Admissibility of minor's statement; notice

A. Except as otherwise provided in title 8, a statement made by a minor who is under the age of ten years describing any sexual offense or physical abuse performed with, on or witnessed by the minor, which is not otherwise admissible by statute or court rule, is admissible in evidence in any criminal or civil proceeding if both of the following are true:



1. The court finds, in an in camera hearing, that the time, content and circumstances of the statement provide sufficient indicia of reliability.

2. Either of the following is true:

(a) The minor testifies at the proceedings.

(b) The minor is unavailable as a witness, provided that if the minor is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the statement.

B. A statement shall not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

#### Arkansas - Rules of Evidence

Rule 803. Hearsay exceptions - Availability of declarant immaterial.- The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

(25)(A) A statement made by a child under ten (10) years of age concerning any act or offense against the child involving sexual offenses, child abuse or incest is admissible in any criminal proceeding in a court of this State, provided:

1. The Court finds, in a hearing conducted outside the presence of the jury, that the statement offered possesses a reasonable likelihood of trustworthiness using the following criteria:

- a. the age of the child
- b. the maturity of the child
- c. the time of the statement
- d. the content of the statement
- e. the circumstances surrounding the giving of the statement
- f. the nature of the offense involved
- g. the duration of the offense involved
- h. the relationship of the child to the offender
- i. the reliability of the assertion
- j. the reliability-credibility of the child witness before the Judge
- k. the relationship or status of the child to the one offering the statement
- l. any other corroborative evidence of the act which is the subject of the statement.

m. any other fact or which the Court at the time and under the circumstances deems relevant and appropriate.

2. The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

3. If a statement is admitted pursuant to this Section the Court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors.

4. This Section shall not be construed to limit the admission of an offered statement under any other hearsay exception or applicable Rule of Evidence.

#### California - Evidence Code

§ 1228. Statement of minor child as victim of sexual abuse.

Notwithstanding any other provision of law, for the purpose of establishing the elements of the crime in order to admit as evidence the confession of a person accused of violating Section 261, 264.1, 285, 286, 288, 288a, 289, or 647a of the Penal Code, a court, in its discretion, may determine that a statement of the complaining witness is not made inadmissible by the hearsay rule if it finds all of the following:

(a) The statement was made by a minor child under the age of 12, and the contents of the statement were included in a written report of a law enforcement official or an employee of a county welfare department.

(b) The statement describes the minor child as a victim of sexual abuse.

(c) The statement was made prior to the defendant's confession. The court shall view with caution the testimony of a person recounting hearsay where there is evidence of personal bias or prejudice.

(d) There are no circumstances such as significant inconsistencies between the confession and the statement concerning material facts establishing any element of the crime or the identification of the defendant, that would render the statement unreliable.

(e) The minor child is found to be unavailable pursuant to paragraph (2) or (3) of subdivision (a) of Section 240 or refuses to testify.

(f) The confession was memorialized in a trustworthy fashion by a law enforcement official.

If the prosecution intends to offer a statement of the complaining witness

pursuant to this section, the prosecution shall serve a written notice upon the defendant at least ten days prior to the hearing or trial at which the prosecution intends to offer the statement.

If the statement is offered during trial, the court's determination shall be made out of the presence of the jury. If the statement is found to be admissible pursuant to this section, it shall be admitted out of the presence of the jury and solely for the purpose of determining the admissibility of the confession of the defendant.

#### Colorado - Evidence-General Provisions

§ 13025-129. Statements of child victim of unlawful sexual offense against a child or of child abuse - hearsay exception. (1) An out-of-court statement made by a child, as child is defined under the statutes which are the subject of the action, describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, C.R.S. performed with, by, on, or in the presence of the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of an unlawful sexual offense, as defined in section 18-3-411 (1), C.R.S. or in which a child is the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104(1)(b), C.R.S., and an out-of-court statement by a child, as child is defined under the statutes which are the subject of the action,



describing any act of child abuse, as defined in section 18-6-401, C.R.S., to which the child declarant was subjected or which the child declarant witnessed, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of child abuse or the subject of a proceeding alleging that a child is neglected or dependent under section 19-1-104(1)(b), C.R.S., if:

(a) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards or reliability; and

(b) The child either:

(I) Testifies at the proceedings; or

(II) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(2) If a statement is admitted pursuant to this section, the court shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(3) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement.

## Florida - Evidence Code

§ 90.803. Hearsay exceptions; availability of declarant immaterial

The provision of § 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(23) Hearsay exception; statement of child victim of sexual abuse or sexual offense against a child.-

(a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 11 or less describing any act of child abuse, sexual abuse, or any other offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with by, or on the declarant child, not otherwise admissible, is admissible, is admissible in evidence in any civil or criminal proceeding if:

1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and

2. The child either:

a. Testifies; or



b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to § 90.804(1).

(b) In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement.

(c) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this subsection.

Added by laws 1985, c 85-53 § 4, eff. July 1985. Amended by Laws 1987, c. 87-224, § 11.

#### Georgia - Evidence Code

§ 24-3-16 Testimony as to child's description of sexual contact or physical abuse.

A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to

testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability. (Code 1981, § 24-3-16, enacted by Ga. L. 1986. p. 668. § 1.)

#### Idaho - Rules of Evidence

§ 19-3024. Statements by child

Statements made by a child under the age of ten (10) years describing any act of sexual abuse, physical abuse, or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the child protective act, Chapter 16, title 16, Idaho Code, or in any criminal proceedings in the courts of the state of Idaho if:

1. The court finds, in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and

2. The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness. A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. Provided, that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.

Statements may not be admitted unless the proponent of the statements, notifies the adverse party of his intention to offer the statements and the particulars of the statements

sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements.

Rule 803, Idaho Rules of Evidence provides:

Rule 803. Hearsay exceptions; availability of declarant immaterial. - The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

#### Illinois - Criminal Law and Procedure

§ 115-10 Sexual acts on child under 13 - Hearsay exception § 115-10. (a) In a prosecution for a sexual act perpetrated upon a child under the age of 13, including but not limited to

prosecutions for violations of sections 12-13 through 12-16 of the Criminal Code of 1961, the following shall be admitted as an exception to the hearsay rule:

(1) testimony by such child of an out of court statement made by such child that he or she complained of such act to another; and

(2) testifies of an out-of-court statement made by such child describing any complaint of such act or matter or detail pertaining to any act which is an element of an offense which is the subject of a prosecution for a sexual act perpetrated upon a child.

(b) Such testimony shall only be admitted if:

(1) The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and

(2) The child either:

(A) Testifies at the proceeding; or

(B) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(c) If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor.

(d) The proponent of the statement shall give the adverse party reasonable notice of his intention to offer the statement and the particulars of the



statement.

#### Indiana - Rules of Procedure

§ 35-37-4-6 Application of section; admissibility of statement or videotape made by children; notice to defendant of hearing; corroborative evidence: prosecuting attorney's duties

Sec. 6. (a) This section applies to criminal actions for the following:

- (1) Child molesting (IC 35-42-4-3).
- (2) Battery upon a child (IC 35-42-2-1(2)(B)).
- (3) Kidnapping (IC 35-42-3-2)
- (4) Confinement (IC 35-42-3-3).
- (5) Rape (IC 35-42-4-1).
- (6) Criminal deviate conduct (IC 35-42-4-2).

(b) A statement or videotape that:

(1) is made by a child who was under ten (10) years of age at the time of the statement or videotape;

(2) concerns an act that is material element of an offense listed in subsection (a) that was allegedly committed against the child; and

(3) is not otherwise admissible in evidence under statute or court rule; is admissible in evidence in a criminal action for an offense listed in subsection (a) if the requirements of subsection (c) are met.

(c) A statement or videotape described in subsection (b) is admissible in evidence in a criminal action listed in subsection (a) if, after notice to the defendant of a hearing and of his right to be present:

(1) the court finds, in a hearing:

(A) conducted outside the presence of the jury; and

(B) attended by the child; that the time, content, and

circumstances of the statement or videotape provide sufficient indications of reliability; and

(2) the child:

(A) testifies at the trial; or

(B) is found by the court to be unavailable as a witness because:

(i) a psychiatrist has certified that the child's participation in the trial would be a traumatic experience for the child;

(ii) a physician has certified that the child cannot participate in the trial for medical reasons; or

(iii) the court has determined that the child is incapable of understanding the nature and obligation of an oath.

(d) If a child is unavailable to testify at the trial for a reason listed in subsection (c)(2)(B), a statement or videotape may be admitted in evidence under this section only if there is corroborative evidence of the act that was allegedly committed against the child.

(e) A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney of:

(1) his intention to introduce the statement or videotape in evidence; and

(2) the content of the statement or videotape;

within a time that will give the defendant a fair opportunity to prepare a response to the statement or videotape before the trial.

#### Kansas - Rules of Evidence

§ 60-460. Hearsay evidence excluded, exceptions. Evidence of a statement



which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except:

(dd) In a criminal proceeding or in a proceeding to determine if a child is a deprived child under the Kansas juvenile code or a child in need of care under the Kansas code for care of children, a statement made by a child, to prove the crime or that the child is a deprived child or a child in need of care, if:

(1) The child is alleged to be a victim of the crime, a deprived child or a child in need of care; and

(2) the trial judge finds, after a hearing on the matter, that the child is disqualified or unavailable as a witness, the statement is apparently reliable and the child was not induced to make the statement falsely by use of threats or promises.

If a statement is admitted pursuant to this subsection in a trial to a jury, the trial judge shall instruct the jury that it is for the jury to determine the weight and credit to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, the nature of the statement, the circumstances under which the statement was made, any possible threats or promises that might have been made to the child to obtain the statement and any other relevant factor.

#### Kentucky - Revised Statutes

§ 421.355 Admissibility of victim's out-of-court statements

(1) Notwithstanding any other

provision of law or rule of evidence, a child victim's out-of-court statements regarding physical or sexual abuse, or neglect of the child are admissible in any criminal or civil proceeding, including a proceeding to determine the dependency of the child, if, prior to admitting such a statement, the court determines that:

(a) The general purpose of the evidence is such that the interest of justice will best be served by admission of the statement into evidence; and

(b) The statements are determined by the court to be reliable based upon the court's consideration of: the age and maturity of the child, the nature and duration of the abuse, the emotional or psychological effects of said abuse or neglect upon the child, the relationship of the child to the offender, the reliability of the child witness, and the circumstances surrounding the statement.

#### Maine - Title 15. Revised Statutes Annotated

§ 1205. Certain out-of-court statements made by minors describing sexual contact

A hearsay statement made by a person under the age of 16 years, describing any incident involving a sexual act or sexual contact performed with or on the minor by another, shall not be excluded as evidence in criminal proceedings in courts of this State if:

1. Mental or physical well-being of a person. On motion of the attorney for the State and at an in camera hearing, the court finds that the mental or physical well-being of that person will more likely than not be harmed if that person were to testify in open court; and

2. Examination and cross-examination. Pursuant to order of court made on such a motion, the statement is made under oath, subject to all of the rights of confrontation secured to an accused by the Constitution of Maine or the United States Constitution and the statement has been recorded by any means approved by the court, and is made in the presence of a judge or justice.

**Maryland - Annotated Code of Maryland § 9-103.1.** Out of court statements of child abuse victims.

(a) "Statement" defined. - In this section "statement" means:

- (1) An oral or written assertion; or
- (2) Nonverbal conduct, if it is intended as an assertion, including sounds, gestures, demonstrations, drawings, or similar actions.

(b) Admissibility - In general. -

(1) Subject to the provisions of paragraphs (2) and (3) of this subsection, if a court finds that the requirements of subsection (c) of this section are satisfied, a court may admit into evidence in a criminal proceeding an out of court statement, to prove the truth of the matter asserted in the statement, made by a child victim under the age of 12 years, who is the alleged victim in the case before the court, concerning an alleged offense against the child of child abuse, as defined under Article 27, § 35A of the Code.

(2)(i) An out of court statement may be admissible under this section only if the statement was made to and is offered by:

1. A licensed physician, as defined under § 14-101 of the Health Occupations Article;
2. A licensed psychologist, as

defined under § 16-101 of the Health Occupations Article;

3. A licensed social worker, as defined under § 18-101 of the Health Occupations Article; or

4. A teacher; and

(ii) The individual described under item (i) of this paragraph was acting in the course of the individual's profession when the statement was made.

(3) An out of court statement may be admissible under this section only if the statement possesses particularized guarantees of trustworthiness.

(c) Same - Conditions precedent. -

(1) An out of court statement by a child may come into evidence to prove the truth of the matter asserted in the statement if the child is subject to cross-examination about the out of court statement and testifies:

(i) At the criminal proceeding; or

(ii) By closed circuit television

(2) An out of court statement by a child may come into evidence to prove the truth of the matter asserted in the statement if:

(i) The child is unavailable to testify at the criminal proceeding due to the child's:

1. Death;

2. Absence from the jurisdiction, for good cause shown, and the State has been unable to procure the child's presence by subpoena or other reasonable means;

3. Serious physical disability; or

4. Inability to communicate about the alleged offense due to serious emotional distress;

(ii) The child's statement is not admissible under any other hearsay



exception; and

(iii) There is a corroborative evidence.

(3) In order to provide the defendant with an opportunity to prepare a response to the statement, the prosecutor shall give to the defendant and the defendant's attorney, at least 20 days before the criminal proceeding in which the statement is to be offered into evidence, notice of:

(i) The prosecution's intention to introduce the statement; and

(ii) The content of the statement.

(4)(i) The defendant shall have the right to take the deposition of a witness who will testify under this section;

(ii) Unless the State and the defendant agree, or the court orders otherwise, the defendant shall file a notice of deposition at least 5 days before the date of the deposition; and

(iii) Except where inconsistent with this paragraph, the provisions of Maryland Rule 4-261 shall apply to a deposition taken under this paragraph.

(d) Particularized guarantees of trustworthiness. - In order to determine if a child's statement possesses particularized guarantees of trustworthiness under this section, the court shall consider, but is not limited to, the following factors:

(1) The child's personal knowledge of the event;

(2) The certainty that the statement was made,

(3) Any apparent motive to fabricate or exhibit partiality by the child, including interest, bias, corruption, or coercion;

(4) Whether the statement was

spontaneous or directly responsive to questions;

(5) The timing of the statement;

(6) Whether the child's young age makes it unlikely that the child fabricated the statement that represents a graphic, detailed account beyond the child's knowledge and experience and the appropriateness of the terminology to the child's age;

(7) The nature and duration of the abuse;

(8) The inner consistency and coherence of the statement;

(9) Whether the child was suffering pain or distress when making the statement;

(10) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement;

(11) Whether the statement is suggestive due to the use of leading questions; and

(12) The credibility of the person testifying about the statement.

(e) Role of court. - The court, in determining whether a statement is admissible under this section, in a hearing outside the presence of a jury, shall:

(1) Make a finding on the record as to the specific guarantees of trustworthiness that are present in the statement; and

(2) Determine the admissibility of the statement.

(f) Construction of section - This section may not be construed to limit the admissibility of a statement under any other applicable hearsay exception or rule of evidence. (1988, chs. 548, 549.)



**Minnesota - Chapter 595. Witnesses**

**§ 595.02**

Subd. 3. Certain out-of-court statements admissible. An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining, denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in a hearing conducted outside of the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child or person mentally impaired as defined in section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or  
(ii) is unavailable as a witness and there is corroborative evidence of the act; and

(c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

For purposes of this subdivision, an out-of-court statement includes video,

audio, or other recorded statements. An unavailable witness includes an incompetent witness.

**Mississippi - Mississippi Code Volume 4**

**§ 13-401. Applicability of special evidentiary provisions.**

The rules of evidence prescribed in Sections 13-1-401 through 13-1-415 shall be applicable in any youth court proceeding and in any criminal prosecution under the following sections of the Mississippi Code of 1972:

(a) Section 97-5-21, Mississippi Code of 1972, relating to seduction of a child under age eighteen (18);

(b) Section 97-5-23, Mississippi Code of 1972, relating to the touching of a child for lustful purposes;

(c) Section 97-5-23, Mississippi Code of 1972, relating to the exploitation of children;

(d) Section 97-5-39, Mississippi Code of 1972, relating to contributing to the neglect or delinquency of a child and felonious battery of a child;

(e) Section 97-5-41 Mississippi Code of 1972, relating to the carnal knowledge of a stepchild, adopted child or child of a cohabitating partner;

(f) Section 97-3-95, Mississippi Code of 1972, relating to sexual battery; or

(g) Section 97-29-59, Mississippi Code of 1972, relating to unnatural intercourse.

SOURCES: Laws, 1986, ch 345 § 1, eff from and after July 1, 1986.

**§ 13-1-403. Admissibility of child's out-of-court statements.**

(1) An out-of-court statement made by a child under the age of twelve (12)

describing any act of child abuse, sexual abuse or any other offense involving an unlawful sexual act, contact, intrusion or penetration performed in the presence of, with, by or on the declarant child, not otherwise admissible, is admissible in evidence to prove the contents thereof, if:

(a) Such statement is made for the purpose of receiving assistance or advice in order to prevent or mitigate the recurrence of the offenses, or in order to obtain advice about the psychological, social or familial consequences associated with the offenses; and

(b) Such statement is made to a person on whom the child should reasonably be able to rely for assistance, counseling or advice; and

(c) The child either:

(i) Is available to testify; or

(ii) Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. A finding of unavailability, except in those situations specified by Rule 804 of the Mississippi Rules of Evidence shall require a finding by the court, based on the specific behavioral indicators described in § 13-1-411, that the child's participation in the trial would result in a substantial likelihood of traumatic emotional or mental distress; and

(d) The court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient guarantees of trustworthiness. In determining the trustworthiness of the statement, the court may consider the age and maturity

of the child, the nature and duration of the abuse or offense alleged, factors which may detract from the declarant's credibility, information provided about the child's reliability based on the specific behavioral indicators described in § 13-1-411, or any other factor deemed appropriate.

(2) The defendant shall be notified no later than ten (10) days before trial that an out-of-court statement as described in this section shall be offered in evidence at trial. The notice shall include a written statement of the content of the child's statement, the time the statement was made, the circumstances surrounding the statement which indicate its reliability and such other particulars as necessary to provide full disclosure of the statement.

(3) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

#### Mississippi - Proposed Rule of Evidence Rule 803(25)

(25) Tender Years Exception. A statement made by a child of tender years describing any act of sexual contact performed with or on the child by another is admissible in evidence if: (a) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (b) the child either (1) testifies at the proceedings; or (2) is unavailable as a witness: provided, that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.



### Comment

Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements, (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. A finding that there is a sufficient indicia of reliability should be made on the record.

Mississippi's pre-rule tender years exception did not define "tender years". See *Williams v. State*, 427 So.2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration need not be eyewitness testimony or physical evidence, but may

include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

### **Missouri - Revised Statutes of the State of Missouri**

Chapter 491 § 491.075 R.S.Mo. (1988)

491.075 Statement of child under twelve admissible, when

1. A statement made by a child under the age of twelve relating to an offense under Chapter 565, 566 or 568, R.S.Mo., performed with or on a child by another, not otherwise admissible by a statute or court rule is admissible in evidence in criminal proceedings in the courts of this state as substantive evidence to prove the truth of the matter asserted if:

(1) The court finds, in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

- (a) Testifies at the proceedings; or
- (b) Is unavailable as a witness.

2. Notwithstanding subsection 1 of this section or any provision of law or rule of evidence requiring corroboration of statements, admissions or confessions of the defendant, and notwithstanding any prohibition of hearsay evidence, a statement by a child when under the age of twelve who is alleged to be a victim of an offense under chapter 565, 566 or 568, R.S.Mo., is sufficient corroboration of a statement, admission or confession regardless of whether or not the child is available to testify regarding the offense.

3. A statement may not be admitted under this section unless the



prosecuting attorney makes known to the accused or his counsel his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the accused or his counsel with a fair opportunity to prepare to meet the statement.

4. Nothing in this section shall be construed to limit the admissibility of statements, admissions or confessions otherwise admissible by law.

History. L. 1985 H.B. 366, et. al.

Effective 7-19-85

**Nevada Rev. Stat. Ann. Chapter 51**

§ 51.385. Admissibility; notice of unavailability of child to testify.

1. In addition to any other provision for admissibility made by statute or rule of court, a statement made by a child under the age of 10 years describing any act of sexual conduct performed with or on the child is admissible in a criminal proceeding regarding that sexual conduct if the:

(a)

Court finds, in a hearing out of the presence of the jury, that the time, content and circumstances of the statement provide sufficient circumstantial guarantees of trustworthiness; and

(b)

Child either testifies at the proceeding or is unavailable or unable to testify.

2. If the child is unavailable or unable to testify, written notice must be given to the defendant at least 10 days before the trial of the

prosecution's intention to offer the statement in evidence. (1985, p. 2132.)

**New Jersey Senate Joint Resolution No. 56**

Rule 63. Hearsay evidence excluded; exceptions.

Evidence of a statement offered to prove the truth of the matter stated which is made other than by a witness while testifying at the hearing is hearsay evidence and is inadmissible except as provided in Rules 63 (1) through [63 (32)] 63 (33).

A new rule designated as Rule 63 is adopted to read as follows:

Rule 63 (33). Statements by a child relating to a sexual offense.

A statement a child under the age of 12 relating to a sexual offense under the Code of Criminal Justice committed on, with, or against that child is admissible in a criminal proceeding brought against a defendant for the commission of such offense if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 8 (1), that on the basis of the time, content, and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to

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this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of paragraph (b) of Rule 17.

**North Dakota Rule of Evidence**  
Rule 803(24)

(24) Child's Statement About Sexual Abuse. An out-of-court statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child is admissible as evidence (when not otherwise admissible under another hearsay exception) if:

(a) The trial court finds, after hearing upon notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and

(b) The child either:

(i) Testifies at the proceedings; or

(ii) Is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement

**Oklahoma - Evidence Code**

§ 2803.1. Statements of children 12 years of age or younger describing acts of sexual contact--Admissibility in criminal and juvenile proceedings.

A. A statement made by a child twelve (12) years of age or younger which describes any act of sexual contact performed with or on the child by another, is admissible in criminal and juvenile proceedings in the courts in this state if:

1. The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

2. The child either:

a. testifies at the proceedings, or

b. is unavailable as defined in Title 12 as a witness.

When the child is unavailable as defined in Title 12 as a witness, such statement may be admitted only if there is corroborative evidence of the fact.

B. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at least ten (10) days in advance of the proceedings to provide the adverse party with an opportunity to prepare to answer the statement.

**Oregon Rev. Stat.**

§ 40.460 (1989)

40.460 Rule 803. Hearsay exception; availability of declarant immaterial. The following are not excluded by ORS 40.455, even though the declarant is available as a witness:

(18a)(a) A complaint of sexual misconduct made by the prosecuting witness after the commission of the alleged offense. Except as provided in paragraph (b) of this subsection, such evidence must be confined to the fact that the complaint was made.

(b) A statement made by a child victim who is under 10 years of age, which statement describes an act of sexual conduct performed with or on the child by another, is not excluded by ORS 40.455 if the statement is offered as



evidence in the criminal trial or juvenile court proceeding and if the child either testifies at the proceeding and is subject to cross-examination or is unavailable as a witness and if the proponent of admissibility establishes to the satisfaction of the court outside the presence of the jury, if any, that the time, content and circumstances of the statement provide substantial indicia of reliability. However, when the child is unavailable as a witness, the statement may be admitted in evidence only if there is corroborative evidence of the act of sexual conduct and of the defendant's participation in the conduct. No statement may be admitted under this paragraph except upon motion of the state and unless the proponent of the statement makes known to the adverse party the proponent's intention to offer the statement and the particulars of the statement no later than 15 days before trial, except for good cause shown. For purposes of this paragraph, in addition to those situations described in ORS 40.465 (1), the child shall be considered "unavailable" if the child has a substantial lack of memory of the subject matter of the statement, is presently incompetent to testify, is unable to communicate about the offense because of fear or other similar reason or is substantially likely, as established by expert testimony, to suffer lasting severe emotional trauma from testifying. Unless otherwise agreed by the parties, the court shall examine the child in chambers and on the record or outside the presence of the jury and on the record. The examination shall be conducted in the presence of

the attorneys and the child's parent, legal guardian or other suitable adult as designated by the court. The purpose of the examination shall be to aid the court in making its findings regarding the child's availability as a witness and the reliability of the child's statement. In determining whether a statement possesses substantial indicia of reliability under this paragraph, the court may consider, but is not limited to, the following factors:

(A) The child's personal knowledge of the event;

(B) The age and maturity of the child;

(C) Certainty that the statement was made, including the credibility of the person testifying about the statement and any motive the person may have to falsify or distort the statement;

(D) Any apparent motive the child may have to falsify or distort the event, including the statement;

(E) The timing of the child's statement;

(F) Whether more than one person heard the statement;

(G) Whether the child was suffering pain or distress when making the statement;

(H) The nature and duration of any alleged abuse;

(I) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(J) Whether the statement has internal consistency or coherence and uses terminology appropriate to the child's age;

(K) Whether the statement is



spontaneous or directly responsive to questions;

(L) Whether the statement was elicited by leading questions; and

(M) Whether extrinsic evidence exists to show the accused's opportunity to commit the act to which the child's statement refers.

**Pennsylvania - Title 42. Pennsylvania Consolidated Statutes**

**§ 5985.1. Admissibility of Certain Statements.**

(A) General Rule.--An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing indecent contact, sexual intercourse or deviate sexual intercourse performed with or on the child by another, not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal proceeding if:

(1) The court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability.

(2) The child either:

(I) Testifies at the proceeding; or

(II) Is unavailable as a witness and there is corroborative evidence of the act.

(B) Notice Required -- A statement otherwise admissible under subsection (A) shall not be received into evidence unless the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

**South Dakota - Rule of Evidence**

§ 19-16-38. Statement of sex crime victim under age ten. A statement made by a child under the age of ten describing any act of sexual contact or rape performed with or on the child by the defendant, not otherwise admissible by statute or court rule, is admissible in evidence in criminal proceedings against the defendant in the courts of this state if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is available as a witness.

However, if the child is unavailable as a witness, such statement may be

admitted only if there is corroborative evidence of the act.

No statement may be admitted under this section unless the proponent of the statement makes known his intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

**Texas - Code of Criminal Procedure**

Art. 38.072. Hearsay statement of child abuse victim. Sec. 1. This article applies to a proceeding in the prosecution of an offense under any of the following provisions of the Penal Code, if committed against a child 12 years of age or younger.

(1) Chapter 21 (Sexual Offenses) or 22 (Assaultive Offenses);

(2) Section 25.02 (Incest);

(3) Section 25.06 (Solicitation of a Child, added by Chapter 413, Acts of the 65th Legislature, Regular Session, 1977); or

(4) Section 43.25 (Sexual Performance by a Child).

Section 2. (a) This article applies only to statements that describe the alleged offense that:

(1) were made by the child against whom the offense was allegedly committed; and

(2) were made to the first person, 18 years of age or older, other than the defendant, to whom the child made a statement about the offense.

(b) A statement that meets the requirements of Subsection (a) of this

article is not inadmissible because of the hearsay rule if:

(1) on or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) notifies the adverse party of its intention to do so;

(B) provides the adverse party with the name of the witness through whom it intends to offer the statement; and

(C) provides the adverse party with a written summary of the statement;

(2) the trial court finds, in a hearing conducted outside the presence of the jury, that the statement is reliable based on the time, content, and circumstances of the statement; and

(3) the child testifies or is available to testify at the proceeding in court or in any other manner provided by law.

Added by Acts 1985, 69th Leg., ch 590 § 1, eff. Sept. 1, 1985.

**Utah - Criminal Code**

§ 76-5-409. Corroboration of admission by child's statement. (1) Notwithstanding any provision of law requiring corroboration of admissions or confessions, and notwithstanding any prohibition of hearsay evidence, a child's statement indicating in any manner the occurrence of the sexual offense involving the child is sufficient corroboration of the admission or the confession regardless of whether or not the child is available to testify regarding the offense.

(2) A child, for purposes of Section (1), is a person under the age of 14.

§ 76-5-410. Child victim of sexual abuse as competent witness. A child victim of



sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony.

§ 76-5-411. Admissibility of out of court statement of child victim of sexual abuse [Effective until July 1, 1990]. (1) Notwithstanding any rule of evidence, a child victim's out of court statement regarding sexual abuse of that child is admissible as evidence though it does not qualify under an existing hearsay exception, if:

(a) the child is available to testify in court or as provided by Subsection 77-35-15.5(2) or (3)

(b) in the event the child is not available to testify in court or as provided by Subsection 77-35-15.5(2) or (3), there is other corroborative evidence of the abuse; or

(c) the statement qualifies for admission under Subsection 77-35-15.5(1).

(2) Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child.

(3) A statement admitted under this section shall be made available to the adverse party sufficiently in advance of the trial or proceeding, to provide him

with an opportunity to prepare to meet it.

(4) For purposes of this section, a child is a person under the age of 14 years.

#### Admissibility of out-of-court statement of child victim of sexual abuse

[Effective July 1, 1990]

(1) Notwithstanding any rule of evidence, a child victim's out-of-court statement regarding sexual abuse of that child is admissible as evidence although it does not qualify under an existing hearsay exception, if:

(a) the child is available to testify in court or under Rule 15.5(2) or (3), Utah Rules of Criminal Procedure;

(b) if the child is not available to testify in court or under Rule 15.5(2) or (3), Utah Rules of Criminal Procedure, there is other corroborative evidence of the abuse; or

(c) the statement qualifies for admission under Rule 15.5(1), Utah Rules of Criminal Procedure.

(2) Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion of the child.

(3) A statement admitted under this section shall be made available to the adverse party sufficiently in advance of the trial or proceeding, to provide him



with an opportunity to prepare to meet it.

(4) For purposes of this section, a child is a person under the age of 14 years.

#### Vermont - Rules of Criminal Procedure

##### Rule 804a Hearsay Exception; Putative Victim Age Ten or Under

(a) Statements by a person who is a child ten years of age or under at the time of trial are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a criminal case in which the child is a putative victim of sexual assault under 13 V.S.A. § 3252, aggravated sexual assault under 13 V.S.A. § 3253, lewd or lascivious conduct with a child under 13 V.S.A. § 2602 or incest under V.S.A. § 205, and the statements concern the alleged crime; or the statements are offered in a juvenile proceeding under chapter 12 of Title 33 involving a delinquent act alleged to have been committed against a child ten years of age or under, if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need of care or supervision under chapter 12 of Title 33, and the statement relates to the sexual abuse of the child;

(2) the statements were not taken in preparation for a legal proceeding and, if a criminal or delinquency proceeding has been initiated, the statements were made prior to the defendant's initial appearance before a judicial officer

under Rule 5 of the Vermont Rules of Criminal Procedure;

(3) the child is available to testify either in court or under Rule 807; and

(4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness.

(b) Upon motion of either party, the court shall require the child to testify for the state. - Added 1985, No. 82 § 2, eff. July 1, 1985; amended October 30, 1986, eff. March 1, 1987.

Rule 26 (d) Hearsay Statement of a Victim who is a Child Ten Years of Age or Under. When the state in a criminal action intends to offer hearsay statements of a victim who is a child ten years of age or under, made admissible by Rule 804a of the Vermont Rules of Evidence the state shall furnish to the defendant a written statement of the evidence it intends to offer, including the name of each witness who will testify to the statement of the victim, at least 30 days before trial. The court may allow the notice to be given at a later date, including during trial, if it determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence results has newly arisen in the case. Amended Jan. 14, 1985, eff. March 15, 1985; 1985 No. 82 § 3, eff. July 1, 1985; Dec. 8, 1988 eff. March 1, 1989.

#### Washington - Washington Criminal Code

§ 9A.44.120 Admissibility of child's statement-Conditions

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness:

Provided, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. Enacted by Laws 1982, ch. 129, § 2. Amended by Laws 1985, ch. 404 § 1.

Sample Statute, American Bar Association, National Legal Resource Center for Child Advocacy and Protection Part IV. Evidentiary Issues.  
4.3 Out-of-Court Statements of Sexual Abuse

A child victim's out-of-court statement of sexual abuse should be admissible into evidence where it does not qualify under an existing hearsay

exception, as long as: (1) the child testifies; or (2) in the event the child does not testify, there is other corroborative evidence of the abuse. Before admitting such a statement into evidence, the judge should determine whether the general purposes of the evidence rules and interests of justice will best be served by admission of the statement into evidence. In addition, the court should consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, the reliability of the assertion, and the reliability of the child witness in deciding whether to admit such a statement.

A statement may only be admitted under this exception if the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it.

#### Hearsay Exception for Child Victim's Out-of-Court Statement of Abuse

(A) An out-of-court statement made by a child under [eleven] years of age at the time of the proceeding concerning an act that is a material element of the offense(s) of [sexual abuse], [physical abuse or battery], [other specified offenses] that is not otherwise admissible in evidence is admissible in any judicial proceeding if the requirements of sections B through F are met.



(B) An out-of-court statement may be admitted as provided in Section A if:

- (1) The child testifies at the proceeding, or testifies by means of videotaped deposition (in accordance with [ ]) or closed-circuit television (in accordance with [ ]), and at the time of such testimony is subject to cross-examination about the out-of-court statement; or
- (2) (a) the child is found by the court to be unavailable to testify on any of these grounds:
  - i) the child's death;
  - ii) the child's absence from the jurisdiction;
  - iii) the child's total failure of memory;
  - iv) the child's persistent refusal to testify despite judicial requests to do so;
  - v) the child's physical or mental disability;
  - vi) the existence of a privilege involving the child;
  - vii) the child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or
  - viii) substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television; and(b) the child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(C) A finding of unavailability under

section B(2)(a)(viii) must be supported by expert testimony.

- (D) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.
- (E) In determining whether a statement possesses particularized guarantees of trustworthiness under section B(2), the court may consider, but is not limited to, the following factors:
  - (1) the child's personal knowledge of the event;
  - (2) the age and maturity of the child;
  - (3) certainty that the statement was made, including the credibility of the person testifying about the statement;
  - (4) any apparent motive the child may have to falsify or distort the event, including bias, corruption, or coercion;
  - (5) the timing of the child's statement;
  - (6) whether more than one person heard the statement;
  - (7) whether the child was suffering pain or distress when making the statement;
  - (8) the nature and duration of any alleged abuse;
  - (9) whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic,



detailed account beyond the  
child's knowledge and  
experience;

(10) whether the statement has a  
"ring of verity", has internal  
consistency or coherence, and  
uses terminology appropriate to  
the child's age;

(11) whether the statement is  
spontaneous or directly  
responsive to questions;

(12) whether the statement is  
suggestive due to improperly  
leading questions;

(13) whether extrinsic evidence  
exists to show the defendant's  
opportunity to commit the act  
complained of in the child's  
statement.

(F) The court shall support with  
findings on the record any rulings  
pertaining to the child's  
unavailability and the  
trustworthiness of the out-of-court  
statement.

(Recommendations for Improving Legal  
Intervention in Intrafamily Child Sexual  
Abuse Cases. National Legal Resource  
Center for Child Advocacy and  
Protection, Young Lawyers Division,  
American Bar Association. October 1982;  
5th Printing June 1987.)

MAR 30 1990

JOSEPH F. SARNIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

STATE OF IDAHO,

*Petitioner,*

—v.—

LAURA LEE WRIGHT,

*Respondent.*

ON WRIT OF *CERTIORARI*  
TO THE SUPREME COURT OF IDAHO

**BRIEF *AMICUS CURIAE* OF THE  
AMERICAN CIVIL LIBERTIES UNION  
IN SUPPORT OF RESPONDENT**

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## INTEREST OF *AMICUS*<sup>1</sup>

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*.

The epidemic in reported cases of child abuse represents a national tragedy that creates strong pressure to depart from the traditional safeguards afforded criminal defendants. This case reflects those pressures and therefore raises issues of organizational concern to the ACLU.

## SUMMARY OF ARGUMENT

This case presents the question whether a state's strong interest in protecting its young children from sexual abuse justifies dispensing with a defendant's Sixth Amendment right to confrontation. Past opinions in which the Court has balanced the need of the prosecution and the risk to the accused establish that a state's desire to obtain convictions more easily does not outweigh the defendant's right to be safeguarded against unreliable evidence. When the rationale of these decisions is applied to the facts of this case, the opinion of the Idaho Supreme Court reversing defendant's conviction on constitutional grounds must be affirmed.

Statements made by a two and one-half year old child to a physician selected by the police could not be used against the defendant without violating her Sixth Amendment rights to a fair trial. They were elicited by an agent of the prosecution after the prosecution had

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<sup>1</sup>Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

focused on the defendant, and after the child-declarant had been in the custody of the police overnight. The Confrontation Clause protects against prosecution by *ex parte* evidence. Any suggestion to the contrary raises the specter of Sir Walter Raleigh and has implications beyond the child abuse context. *California v. Green*, 399 U.S. 149, 155 (1970).

Here, defendant was denied her right to confrontation because admission of the statement in the absence of the child affected the jury's ability to assess the evidence accurately. Although this Court has found that some "firmly rooted" hearsay exceptions automatically satisfy the Confrontation Clause, it has never held that the overlap between the hearsay rule and the requirements of the Confrontation Clause is complete. *United States v. Inadi*, 475 U.S. 387, 393, n.5 (1986). The hearsay statement used against the defendant in this case is not admissible pursuant to any "firmly rooted" exception, nor indeed pursuant to any class of hearsay exception recognized by the legislature or judiciary of the state of Idaho. Under these circumstances, the Sixth Amendment requires further judicial scrutiny of the child's statement to determine whether the statement may be used if the child is not produced at trial. Given the age of the child, the circumstances of the interview, the nature of the statement, and the role of the physician, the hearsay statement must be excluded as unreliable.

To safeguard against the admission of unreliable hearsay in this and similar cases, *amicus* proposes a prophylactic rule barring trial testimony based on unrecorded interviews with young children by the prosecution or its agents. Otherwise, defendants will not be meaningfully able to challenge the child's statements at trial as required by the Confrontation Clause. Allowing statements obtained in this manner to be admitted creates an intolerable risk of an erroneous conviction. Furthermore, licensing the use of unrecorded statements would unduly encourage the police

to succumb to public pressures to prosecute alleged child sex offenders without taking effective measures to ensure the reliability of the statements obtained.

## ARGUMENT

### I. A CHILD'S HEARSAY STATEMENT THAT IS ADMISSIBLE PURSUANT TO A STATE'S RESIDUAL HEARSAY EXCEPTION IS INADMISSIBLE FOR PURPOSES OF THE CONFRONTATION CLAUSE IF THE CHILD'S FAILURE TO TESTIFY PREVENTS THE JURY FROM ACCURATELY ASSESSING THE EVIDENCE

The Confrontation Clause of the Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This Court has "long rejected as unintended and too extreme" a literal interpretation of the Clause that would "abrogate virtually every hearsay exception" by requiring the exclusion of any statement not made in court and not subject to cross-examination. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980). On the other hand, this Court has consistently rejected the notion that all statements that satisfy a hearsay exception simultaneously satisfy the dictates of the Confrontation Clause. See *Dutton v. Evans*, 400 U.S. 74, 86 (1970); *California v. Green*, 399 U.S. at 155-56. See also *Lee v. Illinois*, 476 U.S. 530 (1986). A contrary approach would allow legislators and rule-makers immunity from constitutional scrutiny whenever they create a new hearsay exception.

This Court has acknowledged that certain categories of hearsay exceptions are so "firmly rooted" that a court need not subject evidence admitted pursuant to such an exception to further scrutiny to determine if it passes constitutional muster. *Bourjaily v. United States*, 483 U.S. 171, 182-84 (1987); *Ohio v. Roberts*, 448 U.S. 56 (1980). The state's need and the danger that unreliable evidence

will be used against the accused have already been balanced in the gradual evolution of the exception. See *Mattox v. United States*, 156 U.S. 237, 243-44 (1895); *Bourjaily*, 483 U.S. at 183. That is not the case, however, with the residual hearsay exception relied on by petitioner here.

**A. The Hearsay Statements At Issue Do Not Fall Within A Firmly Rooted Exception**

The hearsay statements at issue in this case were made by a two and a half year old child after she had been in police custody overnight. *State v. Giles*, P.2d 191, 192 (Idaho 1989). They were elicited by a physician, chosen by the police, who knew that the police suspected that the child had been sexually abused by her father. Brief for Petitioner at 5. The physician did not make any verbatim record of the interview and discarded the drawing he used in questioning the child. *State v. Wright*, 772 P.2d 1224, 1230 (Idaho 1989). He acted as an investigator for the police by making notes for later use in the criminal process. The specific questions he asked focused exclusively on the child's activities with her father. J.A.122-23. See also J.A.117, 124.

The statements elicited through this process were not admitted pursuant to any of the common law hearsay exceptions that are codified in Idaho's Rules of Evidence.<sup>2</sup> Rather, they were admitted pursuant to the so-called residual exception in Rule 803(24), a rule identical to the similarly numbered provision in the

<sup>2</sup>The prosecution originally sought to justify admission pursuant to Idaho Rule 803(4), Statements for Purposes of Medical Diagnosis or Treatment, but the trial judge relied exclusively on Idaho Rule 803(24) (J.A.112-15). The extension of the medical exception to statements of identity is an innovation in child sex abuse cases and is not a "firmly rooted" aspect of the exception. Consequently, the "resemblance" noted in the Brief of the United States as *Amicus Curiae* at 18 is not relevant to constitutional analysis.

Federal Rules of Evidence. Unlike the firmly rooted hearsay exceptions with which the courts have had centuries of experience,<sup>3</sup> a codified residual hearsay exception has existed for less than twenty years in any jurisdiction.<sup>4</sup> Furthermore, the residual exceptions were designed to accommodate *ad hoc* instances of reliable statements; they were not intended as a vehicle for the judicial creation of additional categories of hearsay exceptions.<sup>5</sup>

Since the child's statement in this case was offered pursuant to a non-firmly rooted exception, it is "presumptively unreliable and inadmissible for Confrontation Clause purposes." *Lee*, 476 U.S. at 543. Accordingly, it "must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. at 66.

**B. A Judicial Finding Of Circumstantial Guarantees Of Trustworthiness For Evidentiary Purposes Does Not Foreclose Constitutional Scrutiny**

The state's argument that a finding of trustworthiness for purposes of the residual hearsay exception disposes of the defendant's constitutional rights assumes an

<sup>3</sup>See e.g., *Mattox*, 156 U.S. at 243 (dying declarations have "from time immemorial . . . been treated as competent testimony"); *Bourjaily*, 483 U.S. at 183 ("the co-conspirator exception to the hearsay rule is steeped in our jurisprudence;" "[t]he admissibility of co-conspirators' statements was first established in this Court over a century and a half ago"); *Lee*, 476 U.S. at 551-52 (Blackmun, J., dissenting) ("statements squarely within established hearsay exceptions possess 'the imprimatur of judicial and legislative experience' . . . and that fact must weigh heavily in our assessment of their reliability for constitutional purposes") (citation omitted).

<sup>4</sup>The Idaho Rules of Evidence became effective in 1985.

<sup>5</sup>Senate Committee on the Judiciary, Report on Federal Rules of Evidence, 93d Cong. 2d Sess. Report No. 93-1277, p.20 (1974) ("Such major revisions are best accomplished by legislative action").



unwarranted congruence between the operation of the hearsay rule and the Confrontation Clause. *California v. Green*, 399 U.S. at 155 ("Our decisions have never established such a congruence"). In making a Rule 803(24) determination of trustworthiness, whether in a civil case or in a criminal case, and regardless of whether the evidence is being offered for or against the accused, the court must answer only one question: Does the proffered statement possess characteristics of trustworthiness equivalent to the trustworthiness that led to the creation of the class exceptions in the hearsay rules?<sup>6</sup>

The Confrontation Clause asks a different question: Will the defendant be deprived of the fair trial guaranteed by the Sixth Amendment<sup>7</sup> if hearsay evidence is admitted against him and the declarant does not testify? A trial court's finding that the statement in question possesses attributes considered significant in the development of traditional exceptions to the hearsay rule does not dispose of this inquiry. In order to determine if the child's absence is excused, the court must consider how

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<sup>6</sup>See Tribe, "Triangulating Hearsay," 87 Harv.L.Rev. 957 (1974) (explaining that exceptions are created when the dangers of either ambiguity or insincerity or erroneous memory or faulty perceptions are minimized, but that the exceptions do not require absence of all of these dangers); Jonakait, "Restoring the Confrontation Clause to the Sixth Amendment," 35 UCLA L.Rev. 557, 607 (1988) ("While . . . hearsay [admitted pursuant to an exception] may be more reliable than hearsay generally, the lessened chance of mistake does not guarantee that the accused's cross-examination of the declarant would not have helped his case").

<sup>7</sup>In *Pointer v. Texas*, 380 U.S. 400, 405 (1965), this Court explained its holding that the Sixth Amendment right to confrontation is obligatory on the states through the Fourteenth Amendment: "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." See also *Strickland v. Washington*, 466 U.S. 668, 685 (1984), and *Faretta v. California*, 422 U.S. 806, 818 (1975).

the Confrontation Clause functions.

This Court has consistently recognized accurate factfinding as the central concern of the Confrontation Clause. *Tennessee v. Street*, 471 U.S. 409, 415 (1985) ("the Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials'"), quoting *Dutton v. Evans*, 400 U.S. at 89. The Confrontation Clause aids the jury in accurate factfinding by ensuring "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness's demeanor." *United States v. Owens*, 108 S.Ct. 838, 843 (1988). "The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee*, 476 U.S. at 540.

This Court has on numerous occasions explained how these "traditional protections" enable the jury to assess the evidence against the defendant. "Compelling [the witness] to stand face to face with the jury in order that they may look at him [enables the jury to] judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Kentucky v. Stincer*, 482 U.S. 730, 736-37 (1987), quoting *Mattox v. United States*, 156 U.S. at 242-43. The oath impresses the witness "with the seriousness of the matter." *California v. Green*, 399 U.S. at 158. And most notably, cross-examination, "the greatest legal engine ever invented for the discovery of truth"<sup>8</sup> "call[s] to the attention of the factfinder the reasons for giving scant weight to the witness' testimony." *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985).

Confrontation ensures that the trier of fact will have "a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. at 161. See also *Owens*, 108 S.Ct. at 843. The right to confrontation

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<sup>8</sup>*California v. Green*, 399 U.S. at 158, quoting 5 Wigmore, § 1367.

therefore is integral to the Sixth Amendment guarantee of the accused's right to trial by jury. When the value of a hearsay statement depends upon an assessment of the declarant's understanding of the obligation to tell the truth and her ability to tell the truth, dispensing with the "traditional protections" forfeits the defendant's right to have guilt determined by a jury of his peers.

In *Kentucky v. Stincer*, 482 U.S. 730, this Court found that a defendant, accused of sodomizing two young children, had not been deprived of his right to confrontation when he was excluded from an in-chambers hearing at which the court determined the children's competency to testify. According to the majority, the crucial question was "whether excluding the defendant from the hearing interferes with his opportunity for effective cross-examination." The Court's description of defendant's ability to bring infirmities in the witnesses' testimony to the attention of the jury paints a picture markedly different from the trial in the instant case:

After the trial court determined that the two children were competent to testify, they appeared and testified in open court. At that point, the two witnesses were subject to full and complete cross-examination, and were so examined . . . Any questions asked during the competency hearing, which respondent's counsel attended and in which he participated, could have been repeated during direct examination and cross-examination of the witnesses in respondent's presence . . . At the close of the children's testimony, respondent's counsel, had he thought it appropriate, was in a position to move that the court reconsider its competency rulings on the ground that the direct and cross-examination had elicited evidence that

the young girls lacked the basic requisites for serving as competent witnesses. Thus, the critical tool of cross-examination was available to counsel as a means of establishing that the witnesses were not competent to testify, as well as a means of undermining the credibility of their testimony.

*Id.* at 740-44.

In this case counsel was not present when Kathy made her statements, and defendant never had the opportunity to cross-examine her.

#### C. The Jury In This Case Could Not Assess Accurately The Child's Out-of-Court Statement

The statements made by Kathy to Dr. Jambura lie at the heart of this case. Yet, for a number of reasons, the jury could not assess their reliability with any degree of confidence. As a result, the admission of Kathy's out-of-court statement deprived defendant of her right to confrontation.

##### 1. The Nature Of The Declarant

Kathy Wright was two and one-half years old at the time she allegedly made the statements to which Dr. Jambura testified. Because the jury neither saw nor heard her, it never had the opportunity to assess whether this two and one-half year old child had reached a developmental stage in which she could understand the need to tell the truth, or could distinguish fact from fantasy. By contrast, this issue remains open throughout the trial when the child testifies, *Stincer*, 482 U.S. at 744, even if the court originally finds the child capable of testifying truthfully. See Idaho Rules of Evidence 603.

The jury in this case was also unable to evaluate



Kathy's capacity for communicative speech,<sup>9</sup> a skill in which children markedly differ.<sup>10</sup> Significantly, the trial judge held Kathy to be incompetent pursuant to Idaho Rules of Evidence 601, which defines as incompetent "[p]ersons whom the court finds to be incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." This ruling suggests, at the very least, that Kathy's credibility may have been suspect at the time of the interview.

It is noteworthy, therefore, that the jury could not observe the manner in which Kathy spoke about "playing" with her father who, according to the prosecution's case, had forcibly raped her two to three days prior to her statement. J.A.106. Would the jurors have found this allegation believable if they had viewed the child's affect when she described her activities with "Daddy"? Factors such as the speed and flow of a witness' speech, as well as articulation, intonation, mannerisms of speech and use of nonverbal modes of communication, on direct and on cross-examination, enter into a jury's assessment. In evaluating suggestibility, a problematic issue with small children, the jury could have considered the child's reaction to unrestricted leading questions on cross-examination. *Owens*, 108 S.Ct. at 843 (no inquiry as to reliability required "when a hearsay declarant is present at trial and subject to unrestricted cross-examination"). Here, it is not even clear from the doctor's testimony precisely what words Kathy used.

Children's statements are often unreliable. Specific questions addressed to a young child may elicit inaccu-

<sup>9</sup>The voir dire of Kathy Wright (six months after her interview with Dr. Jambura), indicates that she had a great deal of difficulty in responding to simple questions. For example, when asked how old she was, she first responded, "Kathy Wright" and then stated she was six years old. (J.A.33-34 and see generally J.A.32-39.)

<sup>10</sup>Brief of *Amici Curiae* American Professional Society on the Abuse of Children *et al.* at 11 [hereinafter Myers Brief].

rate statements because of a child's susceptibility to suggestion,<sup>11</sup> especially in response to leading questions,<sup>12</sup> and because the child may seek to please the interviewer, particularly if he is a figure in authority.<sup>13</sup> Moreover, the child may "confabulate," that is fill in the story with details from the imagination, and remember her response rather than the event,<sup>14</sup> making effective cross-examination far more difficult even when the child is available to testify.

The Myers *amicus* brief filed on behalf of the state concedes that very young children may pose a greater danger of suggestibility.<sup>15</sup> It chides the Idaho court for not citing recent studies that show that children's hearsay statements are more reliable than researchers previously thought.<sup>16</sup> These studies do not demonstrate the kind of

<sup>11</sup>See Goodman and Clarke-Stewart, "Suggestibility in Children's Testimony: Implications for Child Sexual Abuse Investigations" 16, in *Children's Suggestibility (with Special Reference to a Child Witness)* (J. Doris, ed., in press); Cohen & Hernick, "The Susceptibility of Child Witnesses to Suggestion: An Empirical Study," 4 *Law & Hum. Behav.* 201 (1980).

<sup>12</sup>Penrod, Bull, and Lengnick, "Children as Observers and Witnesses: The Empirical Data," 23 *Fam.L.Q.* 411, 422-27 (1989).

<sup>13</sup>Ceci, Ross & Toglia, "Age Differences in Suggestibility: Narrowing the Uncertainties," in *Children's Eyewitness Memory* 79-91 (S. Ceci, M. Toglia & D. Ross eds. 1987).

<sup>14</sup>See e.g., Christiansen, "The Testimony of Child Witnesses: Fact, Fantasy, and The Influence of Pretrial Interviews," 62 *Wash.L.Rev.* 705, 707-11 (1987); Johnson & Foley, "Differentiating Fact From Fantasy: The Reliability of Children's Memory," 40 *J. Soc. Issues* 33, 44-45 (1984); Stafford, "The Child as a Witness," 37 *Wash.L.Rev.* 303, 309-10 (1962).

<sup>15</sup>Myers Brief at 17.

<sup>16</sup>The three authorities who are credited with having prepared Section II of the Myers Brief (see p.1) have all admitted in other settings that the research is too recent to support firm conclusions. See Goodman (continued...)



reliability that is meaningful in a court of law. Instead, they confirm that a psychologist's interest in describing children is of a totally different order than the law's concern with a defendant's constitutional rights.

Two instances are illustrative.<sup>17</sup> The brief asserts: "In several studies, some including children as young as three years of age, researchers found that memory of stressful events is even more enduring than memory for nonstressful events in children." Myers Brief at 13. The cited study<sup>18</sup> concludes: "Not a single error in *free recall* was made by the highly stressed children" (emphasis added). Table 6 accompanying the article indicates, however, that the proportion of correct answers to different types of specific questions ranged from .25 to .82 for all the children, hardly an endorsement for concluding that children who have been exposed to stressful

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<sup>16</sup>(...continued)

& Clarke-Stewart, *supra* note 11 at 16 ("Whether children would misconstrue events to the point that an allegation of abuse would result, is, based on our research, still debatable."); Saywitz, "Testimony: Age-Related Patterns of Memory Errors" 49, in *Children's Eyewitness Memory*, *supra* n.13 ("before generalizing to the legal setting, a transitional phase of research is needed . . ."); Bulkley, "The Impact of New Child Witness Research on Sexual Abuse Prosecutions" 215, in *Perspectives on Children's Testimony* (S. Ceci, D. Ross, M. Toglia eds. 1989) [hereinafter Bulkley] ("the amount of new research in the past five years on child witnesses is so overwhelming that it is difficult for researchers, not to mention others, to be aware of all the available studies and to draw conclusions from them about children's eyewitness abilities").

<sup>17</sup>Both of these illustrations relate to the article by Goodman, Rudy, Bottoms & Aman, "Children's Concerns and Memory: Issues of Ecological Validity in Children's Testimony," in *What Young Children Remember and Know* (R. Fivush & J. Hudson eds. in press) [hereinafter Goodman, Rudy]. This article is the work most frequently relied upon in the Myers brief.

<sup>18</sup>Goodman, Rudy at 38. The article analyzed interviews of 48 three to six year old children that were conducted within two weeks of the children receiving inoculations at a medical clinic.

situations will respond correctly to questioning.<sup>19</sup> Since the brief itself discloses that young children will recall little about an event unless questioned (Myers Brief at 12-15), the statistical significance of the free recall finding has little or no applicability to the real life situations with which a court must deal.

The Myers brief also asserts that children as young as four do not make significantly more false reports than older children in response to leading questions that seek to elicit information that might be relevant to abuse.<sup>20</sup> The text of the article, however, concedes that three of the 18 four year olds interviewed gave answers that "might lead to the suspicion of child abuse."<sup>21</sup> A 17% error rate for four year olds compared to a 7% error rate for seven year olds may have statistical significance

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<sup>19</sup>Goodman, Rudy at 63. No mention is made of whether the parents prepared these children for the inoculations by telling them what to expect, whether the children had ever been inoculated before at the same clinic, or anything about who these children were, or indeed how many of them were three years old.

<sup>20</sup>This conclusion stems from interviews of pairs of 18 four year olds and 18 seven year olds who either played Simon Says for 12 minutes with a male confederate of the authors or watched. The children were asked to relate everything that happened, and were then asked a series of misleading and specific questions, some of which concerned actions that might lead to an accusation of child abuse such as kissing and taking off clothes.

<sup>21</sup>One child answered that the man kissed her and the other child with whom she had been paired, and then added spontaneously "I am a boy. I pretend to be a boy every time." Goodman, Rudy *supra* note 17 at 23. A second child made commission errors about kissing and spanking. The third child claimed that the man had made the other child disappear, stated that a turtle flew through the air (there had been a puppet) but the boy never qualified his response, and stated that the man had put a hot dog in the other boy's mouth. *Id.* at 24. The authors commented: "Without knowing this little boy's terms for sexual anatomy, it is unclear how his response would be interpreted had he produced it in an actual investigation. It might well have caused concern, however." *Id.*

for psychologists. Statistical generalizations may not, however, override the Confrontation Clause's concern with accuracy in the individual case. *Cf. Coy v. Iowa*, 108 S.Ct. 2798, 2803 (1988)(something more than a generalized finding is needed to overcome the right to face-to-face confrontation).

## 2. *The Circumstances Of The Interview*

In contrast to these artificially created situations, reports of real life cases of suspected sexual abuse furnish numerous examples of how children can be manipulated during an interview. For example, in *State in Interest of R.W. v. J.L.W.*, 491 So.2d 652 (La.App.2d Cir. 1986), the juvenile court removed two minor children from the custody of their mother after hearing a child protection investigator testify that the three year, ten month old male child had "related how he and his mother played 'touch' games which he demonstrated with anatomically correct dolls, verbalizing that each touched the other's private parts." *Id.* at 654. The previous day the child had been interviewed by two sheriff's deputies for one hour and 23 minutes. Fortunately for the mother, the interview was videotaped.<sup>22</sup> All the judges, including the trial judge,

<sup>22</sup>Excerpts from the transcription of the videotape are included in the opinion. The child was first asked repeatedly if he played games without his clothes on with his mother. After numerous denials, the questioners shifted to asking about games played without any clothes on. (For example: "... I think I'll have to go and find [you] some toys in a little bit. I'm curious about those games you played without any clothes on. Who taught you to play those games?") *Id.* at 660 (emphasis omitted). "Deals" were offered: "You tell me about these games you play without any clothes on and I'll go see if I can't find you ... handcuffs ... you can play with if you want and also something that flies." *Id.* at 661 (emphasis in original). The child was told that daddy reported that he played with his mother without clothes on. He's shown a toy mouse, Twinkie, and told that Twinkie will find something for him to fly with if he tells them about the games, and

(continued...)

found the interview "tainted and suggestive" because of the questioning techniques used by the interviewers. *Id.* at 666. The child never admitted to sexual activities with the mother. *Id.* at 667. One appellate judge, who ultimately wrote the opinion reversing the judgment of the juvenile court, concluded that "[a]fter the videotape interview any child" would have become "preoccupied with human genitalia." *Id.* at 664-665.

Another glimpse of how pressured an interview can be comes from newspaper accounts of the McMartin child abuse prosecution in California. Jurors, questioned after the two defendants were acquitted on multiple counts, criticized the interviewing techniques used. "Videotapes showed what appeared to be the asking of leading questions and even pressure bordering on coercion to confirm the stories of other children."<sup>23</sup> The

<sup>22</sup>(...continued)

that Twinkie knows that his mother touches him when he doesn't have clothes on. The transcript continues:

*When did your mom put her mouth on your penis?*

I don't know ...

*Where were you ... that's what Twinkie wants to know?*

... at my Dad's ... in Monroe.

*When mom put her mouth on your penis?*

What?

*Do you remember that happening? Did it happen?*

No. I just dreamed about it ...

*Has momma ever put her mouth on your penis? Twinkie wants ... the truth.*

I didn't ... She didn't

Twinkie wants to know why you told us she did ...

*Id.* at 662 (emphasis in original).

<sup>23</sup>N.Y. Times, Jan. 20, 1990, sec. 1 at 12, col. 1. The story reported on excerpts from a videotape about questions to an 8-year-old child "about a game called 'Naked Movie Star' that was said to be played at the preschool. "Well, I didn't really hear it a whole lot," the child said. "I just heard someone yell it from out in the -- someone yelled

-(continued...)



interviewers had been hired by the District Attorney's Office. Hechler, *The Battle and The Backlash* 154 (1988).

### 3. *The Nature Of The Statement*

The nature of Kathy's statement makes its reliability problematic and difficult to assess. Statements that are made contemporaneously and spontaneously while an event is occurring can be assessed by jurors in relation to the event. Cf. *United States v. Inadi*, 475 U.S. at 395-96 (co-conspirators' statements derive their value from the fact that they are made "while the conspiracy is in progress . . .").

Kathy's statement is like a statement at trial. It was elicited not by an event, but by an interviewer with an agenda. Cf. *id.* at 394 (testimony at trial "seldom has independent evidentiary significance of its own"). It was elicited, however, without any of the attendant safeguards that authorize admission of prior testimony. *California v. Green*, 399 U.S. at 165-68 (oath, cross-examination, and a record of the proceedings).

Kathy's statement relates to a past event, is not being reported in its entirety, contains too few details to

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<sup>23</sup>(...continued)  
it."

The story then reports the following exchange between the interviewer, holding an alligator puppet, and the child:

MacFARLANE: Maybe, Mr. Alligator, you peeked in the window one day and saw them playing it, and maybe you could remember and help us. BOY: Well, no, I haven't seen anyone playing "Naked Movie Star." I've only heard the song.

Q. What good are you? You must be dumb.

A. Well, I don't really, ummm, remember anyone play that 'cause I wasn't there, when I . . . when people are playing it.

Q. You weren't? You weren't. That's why we're hoping maybe you saw . . . See, a lot of these puppets weren't there, but they got to see what happened.

confirm its consistency with the supposed event,<sup>24</sup> and was elicited in response to leading questions designed to confirm the questioner's hypothesis. J.A.127-28. The jury cannot evaluate accurately whether her statement recounts a past event, or is the consequence of suggestive questioning in alien surroundings, in the presence of strangers, after undergoing what must have been an extremely unpleasant physical examination. In the absence of Kathy, the jury did not have the information needed to assess the appropriate weight to be given Kathy's statement.

### 4. *The Nature Of The Witness*

Dr. Jambura was not an ordinary fact witness, but an expert. Although Dr. Jambura did not explicitly state that Kathy was telling the truth, his testimony as a whole must certainly have been so understood by the jury. Dr. Jambura's credentials in working with sexually abused children, his experience in talking to children, his claim to find it "incredibly easy" to interview children (J.A. 120), and his acknowledgement that the naming of "daddy" strengthened his opinion that sexual abuse had taken place (J.A.118-19), all signaled to the jury that he interpreted Kathy's statements as meaning that she and her sister were being sexually abused within the family. Consequently, Kathy's statement was devastating to the defendant because it bolstered her sister's testimony, and therefore may have made the jury more willing to

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<sup>24</sup> Dr. Jambura testified:

She would not -- oh, she did not talk any further about that. She would not elucidate what exactly -- what kind of touching was taking place, or how it was happening.

In this connection, it is interesting to note that in a recent study, the authors commented on false affirmative answers by 3 to 5-year olds to questions about their private parts: "It should also be noted that when the children made commission errors to the abuse questions, these errors consisted almost entirely of nods of the head without any elaboration or detail." Goodman, Rudy *supra* note 17 at 32.



believe the claim that her mother abetted the sexual abuse.

Courts have suggested that because of the aura of special reliability and trustworthiness surrounding expert testimony, an expert may never express an opinion about the credibility of another witness. *United States v. Azure*, 801 F.2d 336, 340-41 (8th Cir. 1986)(expert on child sexual abuse could not tell jury that he found child believable; "putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far"; he thereby "essentially told the jury" that Azure was the person who sexually abused her). See also *United States v. Scop*, 846 F.2d 135, 142 (2d Cir. 1988). Surely the danger to the accused is far greater when the expert validates the credibility of a declarant whom the defendant cannot confront. See Hutton, "Child Sexual Abuse Cases: Establishing the Balance Within the Adversary System," 20 J. of L. Reform 491 (1987). Interposing the expert between the declarant and the jury deprives the jury of its right to make determinations of credibility.

As a matter of evidentiary law, an expert may rely upon hearsay statements in reaching his or her conclusions, Idaho Rules of Evidence 703, but the expert's opinion must also be reconciled with the demands of the Confrontation Clause. Cross-examining the expert is not the equivalent of cross-examining the declarant upon whose statements the expert is relying in expressing his opinion.<sup>25</sup> To the contrary, the defendant may be deprived of his rights to confrontation if he has no access to the declarant upon whom the expert is relying. Compare *United States v. Rollins*, 862 F.2d 1282, 1294

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<sup>25</sup>This is not a case like *Delaware v. Fensterer*, 474 U.S. 15. In *Fensterer*, an expert could not remember the basis for his opinion. The *per curiam* opinion found that the Confrontation Clause was satisfied by cross-examination of the expert at trial. But the opinion noted that this was not a case in which a prior out-of-court statement was being introduced. *Id.* at 21.

(7th Cir. 1988)(testimony of FBI expert as to meaning of code words, which was based in part on pretrial interview with informant, did not violate defendants' right to confrontation; defendant had interviewed the informant prior to trial); *United States v. Affleck*, 776 F.2d 1451, 1458 (10th Cir. 1985)(no confrontation violation where government's expert related what he had been told by defendant's former employees, accountants and the Trustee in bankruptcy; court noted "that the appellant had sufficient access to his own former employees, accountants, and the Trustee in bankruptcy and could have countered their statements).

#### **D. Corroborating Evidence Does Not Eliminate A Violation Of The Confrontation Clause**

In *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), this Court stated:

While some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole . . . the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial. It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict.

*Id.* at 686 (citations omitted).

In *Van Arsdall*, the violation of confrontation consisted of an unwarranted restriction on the defendant's

ability to cross-examine a prosecution witness. In this case, the constitutional error is the failure of the declarant to appear as a witness. The *Van Arsdall* approach should be used in this situation as well. The pertinent inquiry remains: how did the lack of cross-examination affect the jury's assessment of Kathy Wright's statement? If confrontation is to be excused when corroborating evidence exists, the constitutional right conveyed by the Sixth Amendment will become meaningless. Prosecutors would be encouraged to rely on weak witnesses whom they would be able to bolster by hearsay evidence that would not violate the Confrontation Clause because it was corroborated. Such bootstrapping would spell an end to the constitutional right embodied in the clause, especially now that so many jurisdictions have enacted a residual hearsay exception identical to the one in this case pursuant to which courts may admit hearsay that does not, however, pass Confrontation Clause muster.

## **II. THE CONFRONTATION CLAUSE SHOULD, AT A MINIMUM, REQUIRE THE EXCLUSION OF A CHILD'S STATEMENT ELICITED BY PROSECUTORIAL AUTHORITIES AT AN UNRECORDED INTERVIEW**

### **A. The Confrontation Clause Requires Special Safeguards When An Adversarial Trial Does Not Enable A Defendant To Meaningfully Challenge The Prosecution's Evidence**

This Court has recognized that the Sixth Amendment protections will not adequately protect the defendant unless they are afforded at a meaningful time. As this Court has also recognized, a realistic assessment of the propensities of the police and the situation of the defendant may require the adoption of prophylactic rules as the instrumental means to further constitutional objectives. See e.g., *Massiah v. United States*, 377 U.S.

201 (1964)(post-indictment statements deliberately elicited from defendant by government agents may not be used against him at trial unless counsel was present).

When, as here, the adversary process at trial does not "compensat[e] for advantages of the prosecuting authorities," *United States v. Ash*, 413 U.S. 300, 314 (1973), additional protections are required to make the right to confrontation meaningful. In particular, an accused cannot protect himself effectively at trial against unrecorded statements elicited from a child by a prosecutorial agent. Such statements should therefore be barred, notwithstanding the existence of a residual hearsay exception, without the necessity of a case-by-case analysis under the Confrontation Clause.

### **B. Prosecutorial Interviews With Children In Child Sex Abuse Prosecutions Must Be Recorded In Order To Protect Defendant Against Unreliable Statements That Cannot Be Challenged Meaningfully At Trial**

This Court has mandated prophylactic rules pursuant to the Sixth Amendment when the risk of erroneous convictions is high. The defendant's situation when he is accused of sexual abuse in an out-of-court statement by a young child is not unlike that of the defendant identified by an eyewitness at a pretrial lineup. In *United States v. Wade*, 388 U.S. 218 (1967), and the companion case of *Gilbert v. California*, 388 U.S. 263 (1967), this Court, mindful that "the annals of criminal law are rife with instances of mistaken identification," *Wade*, 388 U.S. at 228, expressed concern lest the potential for improper suggestion at the lineup deprive an accused of "meaningful examination of the identification witness' testimony at trial." *Stovall v. Denno*, 388 U.S. 293, 297 (1967). In language remarkably pertinent to the new problems posed by child sex abuse prosecutions, the Court explained in *Wade*:

Insofar as the accused's conviction may rest on a courtroom identification in fact



the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. *Pointer v. State of Texas*, 380 U.S. 400. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional . . ."

388 U.S. at 235.

*Wade* and *Gilbert* mandate that an identification made at a lineup conducted in the absence of defendant's counsel -- the special safeguard selected by the Court to ensure reliability -- must be excluded at trial even though the statement would otherwise satisfy the hearsay rule,<sup>26</sup> and even though the statement is corroborated by other evidence.

<sup>26</sup>Federal (and Idaho) Rules of Evidence 801(d)(1)(C) provides: A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person."

rated by other evidence.

Ordinarily, the prosecution interview of a potential witness is not an occasion "so pernicious that an extraordinary system of safeguards is required." *United States v. Ash*, 413 U.S. 300. Statements made at an ordinary witness interview will not satisfy a hearsay exception, and will be usable, if at all, only for impeachment. The opportunity to cross-examine the witness at trial will adequately protect the defendant and satisfy the demands of the Confrontation Clause. In child sex abuse prosecutions, however, the recent adoption of numerous special hearsay exceptions for the statements of children<sup>27</sup> means that the child's interview, as prone to pitfalls and hazards as eyewitness identification, may completely decide the guilt or innocence of the accused if the interview statements are admitted into evidence.<sup>28</sup> When, as here, the child is incompetent to testify, the adversary process contemplated by the Sixth Amendment is not available to defendant.<sup>29</sup> See *Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 390 U.S. 415 (1965); *Pointer v. Texas*, 380 U.S. 400.

Just as the annals of criminal law reveal numerous instances of mistaken identification, *Wade*, 388 U.S. at 228, so do recent events confirm that false accusations of child sexual abuse are not uncommon.<sup>30</sup> Researchers

<sup>27</sup>See Brief for Petitioner at 36, n.14.

<sup>28</sup>*Cf.* Uniform Rules of Evidence 807 (requires audio-visual recording of hearsay statements of children "describing an act of sexual conduct").

<sup>29</sup>Statements of identification, on the contrary, when admitted require production of the declarant at trial. See *United States v. Owens*, 108 S.Ct. 838.

<sup>30</sup>In the *McMartin* case in California, charges against five of the original seven defendants were dropped and the remaining two defendants were acquitted on 52 counts of molesting young children; a

(continued...)



believe that the recent enormous increase in reports of child sexual abuse has been accompanied by a significant rise in unsubstantiated reports.<sup>31</sup> The importance of the child's statements, true or false, is highlighted by the fact that physical evidence of sexual abuse is rare.<sup>32</sup> Recent events also highlight the pivotal role of videotapes in illuminating unduly suggestive interview techniques.<sup>33</sup>

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<sup>30</sup>(...continued)

mistrial was declared on the remaining 12 counts. N.Y. Times, Jan. 19, 1990, A1, col. 2. See also Matthews, *In California a Question of Abuse: An Excess of Child Molestation Cases Brings Kern County's Investigative Methods Under Fire*, Wash. Post, May 31, 1989 at D1 (attorney general's office concluded that children were overinterviewed, pressured and allowed to share one another's accounts). In Minnesota, a prosecutor was publicly rebuked for mishandling an investigation in which charges of sexual abuse against 21 of the 24 defendants were dropped. Two other defendants were acquitted. Shipp, *Prosecutor in Sex Case to Stay in Office*, N.Y. Times, Oct. 11, 1985 at A.15 col.2. See generally Eberle, *The Politics of Child Abuse* (1986).

<sup>31</sup>Two researchers recently concluded that "approximately 8 percent or more of the investigated cases may be fictitious." Raskin & Yuille, "Problems in Evaluating Interviews of Children in Sexual Abuse Cases" 184, 186, in *Perspectives on Children's Testimony* (S.Ceci, D.Ross and M.Toglia eds. 1989). Although one author has criticized this assertion as unfounded, see Bulkley, *supra* note 16 at 216, she herself acknowledges that there "has been a significant rise in unsubstantiated reports during this time." *Id.* at 208. Increased incidents of false accusations in matrimonial disputes have been reported, some of which have culminated in criminal charges. New York Times, Jan. 17, 1987 at A.14, col.2.

<sup>32</sup>Duggan, Aubrey, Doherty, Isquith, Levine and Scheiner, "The Credibility of Children as Witnesses in a Simulated Child Sex Abuse Trial" 71, 73, in *Perspectives on Children's Testimony*, *supra* ("The most commonly reported type of child sexual abuse is nonviolent genital manipulation, which would rarely cause any physical damage.").

<sup>33</sup>When interviewed after the McMartin verdict, the jurors indicated that they were swayed in favor of the defense by the videotaped interviews. N.Y. Times, Jan. 19, 1990, A.1, col.2. The public defender  
(continued...)

Although *Wade-Gilbert* has been limited to identification procedures taking place after adversarial judicial proceedings have been commenced, see *Kirby v. Illinois*, 406 U.S. 682 (1972), the "critical stage" requiring procedural safeguards for prosecution interviews of alleged victims of child sex abuse should not be so restricted. In the identification cases defendant is afforded a second line of defense, announced by the Court simultaneously with *Wade-Gilbert*: the right to have excluded from evidence the results of an identification procedure that was "unnecessarily suggestive and conducive to irreparable mistaken identification." *Stovall v. Denno*, 388 U.S. at 302. See also *Manson v. Brathwaite*, 432 U.S. 98 (1977). Thus, in identification situations, either the defendant will be a witness to the suggestiveness, or, in the case of photographs, the photographs will be available for reconstruction purposes. *Ash*, 413 U.S. at 324 (Stewart, concurring).

When the child does not testify or has had its memory altered by the interview, it is impossible to reconstruct the unrecorded interview of a child. Giving the defendant the burden of proving suggestiveness through cross-examination of the interviewer does not protect him adequately. As this Court said in *Wade*, cross-examination "cannot be viewed as an absolute assurance of accuracy and reliability." 388 U.S. at 235.<sup>34</sup>

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<sup>33</sup>(...continued)

has expressed similar views. See "McMartin's Preschool Lessons," 76 A.B.A.J. 28 (1990)("[A] slam dunk for the prosecution" had interviews not been videotaped).

<sup>34</sup>*Pennsylvania v. Ritchie*, 107 S.Ct. 989 (1987), is not to the contrary. In that case, a child sex abuse prosecution, a plurality of the Court held that defendant could not rely on the Confrontation Clause to obtain information concerning the victim contained in a state agency file made confidential by statute. The majority found that defendant's right to a fair trial had not been violated because the state had required the agency to submit the file for judicial *in camera* review to  
(continued...)

**C. The Idaho Supreme Court Properly Found That The Failure To Record Deprived Defendant Of Her Right To Confrontation**

The Supreme Court of Idaho could properly find that the truth-seeking function of a trial is impaired by the use against defendant of statements elicited by the prosecution from a young child at an unrecorded interview. In an analogous situation, all members of this Court agreed that a state may protect itself against a class of evidence that posed too great a risk of unreliability.

In *Rock v. Arkansas*, 483 U.S. 44 (1987), although the majority held that a *per se* rule excluding all hypnotically enhanced testimony violated the defendant's right to compulsory process,<sup>35</sup> it indicated approval of state adopted procedural safeguards designed to reduce inaccuracies, such as the "[t]ape or video recording of all interrogations," *id.* at 60, as "a means of controlling overt suggestions." *Id.* at 61. See also *id.* at nn.16 & 19. Chief Justice Rehnquist and Justices White, O'Connor and Scalia dissented on the ground that the state was free to adopt a *per se* rule to exclude evidence "whose trustworthiness is inherently suspect." *Id.* at 64. The dissenters pointed out that the state court had observed that "a hypnotized individual becomes subject to suggestion, is likely to confabulate, and experiences artificially increased confidence in both true and false memories following hypnosis." *Id.* at 62.

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<sup>34</sup>(...continued)

determine the presence of information "that may have changed the outcome of his trial had it been disclosed." *Id.* at 1004. In this case there is no way to protect the defendant unless a record is required.

<sup>35</sup>The majority noted that the *per se* rule prevented the defendant from testifying to the details of the homicide with which she was charged. *Id.* at 57. The majority reserved decision as to whether a state could adopt a *per se* exclusionary rule to bar testimony by previously hypnotized witnesses rather than the accused. *Id.* at 58, n.15.

Consistent with the concerns<sup>36</sup> expressed in *Rock*, *amicus* proposes that a rule of exclusion is warranted whenever prosecutorial authorities interview a child after they have focused on the defendant and do not audio or videotape the interview.<sup>36</sup> Moreover, even if the statements are recorded, they must be excluded if they lack sufficient indicia of reliability to satisfy the Confrontation Clause.<sup>37</sup>

The proposed rule balances the needs of the state and the rights of the defendant at very little cost and inconvenience.<sup>38</sup> It is responsive both to the rights of the accused and to the self-evident proposition that prosecutors want to get convictions. See *Lee v. Illinois*, 476 U.S. at 544 (commenting on untrustworthiness of codefendant's "unsworn statement [that] was given in response to the questions of police, who, having already interrogated

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<sup>36</sup>Contrary to petitioners, we do not believe that the Idaho Supreme Court in fact created a prophylactic rule. In characterizing the decision below as having created "three inflexible conditions precedent," Brief of Petitioner at 42, the state seems to be substituting the *per se* language in the concurring opinion in *State v. Giles*, 772 P.2d at 202, regarding criteria for the admission of hearsay pursuant to a residual exception, for the language actually contained in the case that is being reviewed. In *Wright*, the Idaho court held that the particular statements at issue were untrustworthy "[b]ecause of the combined effect of her tender years and the suggestive, inadequately reviewable interview technique applied by Dr. Jambura." 775 P.2d at 1227.

<sup>37</sup>*Amicus* proposes the use of videotape in this context as a prophylactic rule. By contrast, the use of closed circuit television when a declarant is available to testify in person raises different and serious Confrontation Clause problems. The constitutionality of the latter procedure is before this Court in *Maryland v. Craig*, No. 89-478.

<sup>38</sup>The state's protests about not having equipment available when a child blurts out a statement are beside the point. This case concerns statements that are deliberately elicited by the police, or its agent. In 1990, it is highly unlikely that recording equipment will not be available. Also, this case does not involve statements derived in the course of an ongoing therapeutic relationship.



Lee, no doubt knew what they were looking for").<sup>39</sup> It recognizes that defendant cannot get a fair trial when he cannot rely on the adversary process at trial to challenge effectively the hearsay statements elicited by the police. Guidelines such as these will lead to more effective investigations because prosecutors will not be able to badger children into making highly questionable statements. A bright-line prophylactic rule can be effective in reducing undesirable prosecutorial behavior, and in securing more reliable evidence. Consequently, the objectives of the Sixth Amendment and the Confrontation Clause will be served.

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<sup>39</sup>The *Lee* majority discounted the fact that the statement may have constituted a declaration against penal interest: "That concept defines too large a class for meaningful Confrontation Clause analysis. We decide this case as involving a confession by an accomplice which incriminates a criminal defendant." *Id.* at 544.

## CONCLUSION

The defendant in this case was doubly deprived of her right to confrontation. First, she was deprived of her right to confrontation because the jury could not assess accurately the weight to be given Kathy's out-of-court statements since Kathy did not testify at trial. Second, the hearsay account of Kathy's statements at an unrecorded prosecutorial interview should have been excluded because defendant's inability to challenge these statements effectively at trial deprived her of the fair trial guaranteed by the Sixth Amendment. The urgent need to stem the tide of sexual abuse directed at this nation's children cannot be achieved by dispensing with a criminal defendant's constitutional rights.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1989

THE STATE OF IDAHO,

*Petitioner,*

v.

LAURA LEE WRIGHT,

*Respondent.*

On Writ Of Certiorari To The  
Supreme Court Of Idaho

**BRIEF OF AMICUS CURIAE  
NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS  
IN SUPPORT OF RESPONDENT**

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Witnesses: Child Comptency

**STATEMENT OF INTEREST**

**OF THE AMICUS CURIAE**

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than five thousand lawyers throughout the United States. NACDL was organized more than thirty years ago to promote study and research in the defense of criminal cases, as well to improve the quality and integrity of the criminal defense bar.

One of the most important objectives of NACDL is the protection of individual rights guaranteed under the laws and the Constitution of the United States. NACDL seeks to ensure that every person accused of crime receives a fair trial, and that those wrongfully accused are exonerated.

The Amicus Curiae Committee of NACDL has concluded that the issues presented in this case are so vitally important that NACDL should offer its assistance to the Court. The question presented is whether unreliable hearsay evidence in the form of a statement from a mentally incompetent person may be admitted in a criminal trial. The Court's decision may well have a profound impact on the Confrontation Clause and the rights of the criminally accused throughout the United States.

Without necessarily endorsing NACDL's position, the parties have consented to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court: Mr. James T. Jones, Attorney General of the State of Idaho, on behalf of Petitioner, and Mr. Rolf M. Kehne, on behalf of Respondent. Letters of consent are being

filed with the Clerk of this Court on the date of the filing of this brief.

#### SUMMARY OF ARGUMENT

I. Petitioner asserts that the Idaho Supreme Court erroneously reversed Respondent's conviction on the grounds that an out of court statement made by a mentally incompetent person which fell within no established hearsay exception violated the Confrontation Clause. Petitioner claims that the state court adopted a rigid standard requiring that three specific criteria be met before any similar hearsay statement could be admitted at trial. Petitioner urges that the appropriate test would consider the totality of the circumstances regarding such evidence.

A. Petitioner erroneously interprets the state court's decision. That court



did, in fact, apply a totality of the circumstances test. Because the issue presented to this Court misstates the ruling below, certiorari was improvidently granted and this matter should be immediately returned to the state court.

B. Petitioner urges that this Court employ the totality of the circumstances test that was, in reality, applied by the court below. While NACDL submits that this test is inappropriate in the present case, should this Court employ the totality of the circumstances standard, it would be in a position to do no more than review the factual findings of the lower court. On this independent ground, this matter should be remanded without opinion.

II.A. The hearsay declaration at issue is a statement elicited from a two and one-half year old infant who was found

to be mentally incompetent to testify at the time of trial. Her out of court statement does not fall within any established exception to the hearsay rule. The Idaho Supreme Court found that the introduction of the statement under the residual exception to the hearsay rule violated the Confrontation Clause.

Hearsay statements which fall within no recognized exception to the hearsay rule are presumed to be unreliable under the Confrontation Clause. Statements made by a mentally incompetent witness must also be presumed to be unreliable. Hearsay declarations which fall into both of the foregoing categories must therefore be deemed unreliable as a matter of law. The introduction of such evidence violates the Confrontation Clause.

B. Petitioner seeks a broad exception to the Confrontation Clause and the rules of evidence that would allow presently inadmissible hearsay statements by alleged victims in all child sexual abuse cases to be admitted. Petitioner requests a ruling that far exceeds the scope of the issue presented here, the use of hearsay statements by a non-testifying, incompetent witness.

Petitioner complains that prosecutors are unable to introduce hearsay declarations in some child sexual abuse cases under the current law. The declarations to which Petitioner refers are inadmissible because of the simple fact that they are untrustworthy and will impede the search for truth which lies at the heart of the Confrontation Clause.

C. The totality of the circumstances approach advocated by Petitioner would require trial courts to abandon the established Confrontation Clause and hearsay standards in child sexual abuse cases, and substitute an ad hoc approach. Such a system would result in inconsistent and arbitrary application of the Confrontation Clause. It would also present an exception to the hearsay rule so broad that it would endanger the fair and dependable system of justice that has been developed through the careful balancing of the government's ability to enforce the laws and the citizen's right to a fair trial based upon competent evidence.

# ARGUMENT

## I

### CERTIORARI WAS IMPROVIDENTLY

#### GRANTED IN THIS MATTER

At Respondent's state court trial, the prosecution was allowed to introduce hearsay statements made by a two and one-half year old child who was so immature as to be mentally incompetent to testify. Those out of court statements fell within no established exception to the hearsay rule.

On appeal, the Idaho Supreme Court reversed. After considering all of the circumstances surrounding the making of the challenged hearsay, the court ruled that the statement lacked the necessary

indicia of reliability to comply with the dictates of the Confrontation Clause. State v. Wright, 116 Idaho 382, 775 P.2d 1224, 1231 (1989).

#### A. Petitioner Misstates the Issue Presented by this Action.

Petitioner seeks to have this Court decide a question that is not presented by the ruling below. Petitioner claims that the state court held that hearsay statements of a small child may never be admitted unless they are: 1) tape recorded; 2) not prompted by leading questions; and 3) not elicited by an interviewer with preconceived ideas of the anticipated substance of the allegations. Brief for Petitioner ("Pet.Br."), at 41. The Idaho Supreme Court made no such ruling.



Instead, the court simply and correctly found that the hearsay statements of the incompetent child were inadmissible under any recognized hearsay exception, were unreliable, and therefore violated the Confrontation Clause. Id. at 1227, 1231.

While the court did emphasize the absence of a recording, the suggestive questioning, and the interviewer's preconceived ideas of the child's allegations, the opinion does not create a blanket requirement that those three criteria must be present in every case for such evidence to be admissible. 775 P.2d at 1227, 1230-1231.

The issue presented by Petitioner is not raised by the decision of the court below. It is therefore submitted that certiorari was granted based upon an

erroneous characterization of the Idaho Supreme Court's decision.

**B. Petitioner Seeks to have this Court Function as a Trier of Fact.**

In reaching its decision, the Idaho Supreme Court examined all of the facts surrounding the challenged hearsay; it did not set out a series of rigid rules which must be met to conform to the dictates of the Confrontation Clause. Id. at 1227-1231. Petitioner, misinterpreting that opinion, asks this Court to apply the same totality of the circumstances test that was applied below.

Assuming that the totality of the circumstances test is applicable to this

case<sup>1</sup>, Petitioner is seeking to have this Court act solely as a trier of fact. The Court's only function would be to decide whether the factual findings of the lower court were correct. For this matter to involve a question of law, the Court would have to find that, no matter how suggestive the questioning and no matter how impressionable the child, resulting inculpatory allegation are invariably trustworthy.

Under this country's constitutional system of government, this Court sits to decide questions of law, not to resolve factual disputes or enact de facto legislative doctrines that exceed the scope of the issues presented by an

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<sup>1</sup>NACDL contends that the totality of circumstances standard is not applicable to the facts presented See Argument II, infra.

individual case. Petitioner is asking the Court to assume a legislative function. No question of law is presented. A remand without decision is therefore required.

## II

### THE ADMISSION OF HEARSAY STATEMENTS OF A MENTALLY INCOMPETENT WITNESS THAT DO NOT FALL WITHIN AN ESTABLISHED EXCEPTION TO THE HEARSAY RULE VIOLATES THE CONFRONTATION CLAUSE

#### A. Presumptively Unreliable Hearsay from a Mentally Incompetent Witness Violates the Confrontation Clause.

Two undisputed truths dictate the result that must be reached in this case. First, the hearsay declarant, aged three years, one month at the time of trial, was

"incapable of receiving just impressions of the facts . . . or of relating them truly."<sup>2</sup> Rule 601(a), Idaho Rules of Evidence. Both the prosecutor and defense attorney agreed that she was therefore incompetent as a witness. J.A. 39.

Secondly, the infant's hearsay statement falls within no established exception to the hearsay rule. The statement therefore bears none of the indicia of reliability that accompany hearsay that falls within such an exception. Ohio v. Roberts, 448 U.S. 56, 66 (1980).

Under these facts, the Idaho Supreme Court correctly held that the admission of

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<sup>2</sup>For example, after giving non-responsive answers when asked how old she was, the three year old eventually stated that she was six years of age. Joint Appendix ("J.A.") at 32-34.

the challenged evidence violated the Confrontation Clause. NACDL submits, however, that the state court erred in applying a totality of the circumstances standard. Where, as here, the declarant is so incompetent that she cannot testify, and the statements are not sufficiently reliable to fall within a recognized exception, the hearsay is so inherently suspect that its admission violates the Confrontation Clause.

The search for truth is the cornerstone of the Sixth Amendment. "The decisions of this Court make it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that the trier of fact [has] a satisfactory basis for evaluating the truth of the prior



statement.'" Dutton v. Evans, 400 U.S. 74, 89 (1970), quoting California v. Green, 399 U.S. 149, 161 (1970).

It is difficult to conceive of hearsay less reliable than the statements of a two and one-half year old infant. Indeed, this Court recognized ninety five years ago that, "[N]o one would think of calling as a witness an infant only two or three years old . . ." Wheeler v. United States, 159 U.S. 523, 524 (1895).

Perhaps evidencing recognition of this devastating flaw in its case, Petitioner fails to address the reliability of the infant-declarant in its brief.<sup>3</sup> It simply defies logic and common

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<sup>3</sup>Similarly, Amici American Professional Society on the Abuse of Children, et al., writing in support of Petitioner, discuss, at pages 12-25, of their brief, numerous studies that have focused on the mental processes of children. Virtually all of

sense to contend that a statement made by an infant, then thirty months of age, could, without more, be said to provide indicia of reliability.

The courts have been virtually unanimous in their refusal to allow incompetent children to testify in civil or criminal proceedings, Note, Witnesses: Child Competency Statutes, 60 A.L.R.4th 369 (\_\_\_\_). Obviously, the danger of misleading the trier of fact is even greater when the incompetent declarant is not seen in court, but is instead heard

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those studies were equivocal in their findings and focused on children significantly older than the declarant in this case. More importantly, it is undisputed that the declarant in issue here was correctly found to be too immature to provide meaningful testimony.

through the voice of another.<sup>4</sup> Professor Wigmore clearly supports this principle, "If the declarant would have been disqualified to take the stand by reason of infancy, . . . his extrajudicial declarations must also be inadmissible." 5 Wigmore, Evidence, §1445 (Chadbourn rev. 1979).

For purposes of the case at issue, it is unnecessary for the Court to decide whether the rule announced by Professor Wigmore should be adopted in its entirety. Here, the Court must simply recognize that out of court statements made by incompetent witnesses are presumptively unreliable. Although there might be situations in which the circumstances

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<sup>4</sup>This danger is particularly great when the witness is an expert. See, e.g., State v. Roberts, 139 Ariz. 117, 677 P.2d 280, 286 (App. 1983).

surrounding a hearsay statement by such a witness would bring it within a "firmly rooted hearsay exception" that would provide "indicia of reliability", such circumstances clearly do not exist in the present case. Ohio v. Roberts, 448 U.S. at 66. Because the statement at issue here comes within no established hearsay exception, it must be presumed that the statement is unreliable. Id.

The issue before the Court is whether the purpose of the Confrontation Clause, the search for truth, will be aided by the admission of a presumptively unreliable hearsay statement elicited from an infant who cannot be relied upon to follow the witness' oath to testify truthfully. The answer to that question must be no.

B. Petitioner's Request that the Court Fashion a Code of Evidence Applicable

Only to Child Witnesses in Sexual Abuse Cases Must be Rejected.

The right of confrontation stands at the forefront of the constitutional provisions designed to advance the search for truth and to ensure that the wrongfully accused are set free. This Court has long recognized the importance of the Confrontation Clause:

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243 (1895). The right to confront and cross-examine witnesses has not diminished with time, "If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version." United States v. Inadi, 475 U.S. 387, 394 (1986).

With cavalier disregard for the right of confrontation and the search for truth, Petitioner asks this Court to enact a broad exception to the Sixth Amendment, applicable to all alleged victims in child sexual abuse cases. If a "child exception" to the hearsay rule was legitimized, prosecutors would have an



incentive to present their cases through adult witnesses. The defendant's right to confront the accuser would be cast aside. The jury would be forced to make its decision without being granted the opportunity to independently evaluate the credibility of the most important witness.

By making these contentions, Petitioner again asks the Court to make rulings that far exceed the boundaries of the issues presented here. The inquiry in this case focuses solely upon the admissibility of an out of court statement made by a witness who, due to incompetency, does not testify at trial. Since many children are competent to testify by the age of four or five<sup>5</sup>, the

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<sup>5</sup>See, e.g., State v. Superior Court, 149 Ariz. 397, 719 P.2d 283, 287 (App. 1986) (three year old); Lindsey v. State, 465 N.E.2d 721 (Ind. 1984) (five year

resolution of this matter will affect a limited class of cases.

In the vast majority of child sexual abuse cases, the alleged victim is able to testify, thus allowing the trier of fact to make a meaningful assessment of the witness' credibility. The Confrontation Clause issue in such cases is far different from the issue presented here, in which the declarant was neither seen by the jury nor available for cross-examination. The Court must decline Petitioner's invitation to create law to govern controversies that are fundamentally different from this litigation.

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old); Larsen v. State, 686 P.2d 583, 586 (Wyo. 1984) (five year old); Smallwood v. State, 165 Ga. App. 473, 301 S.E.2d 670, 670-671 (1983) (four year old).

Petitioner raises a number of other arguments that are either specious<sup>6</sup> or bear no relation to the issues at hand. Petitioner claims that the dictates of the Confrontation Clause should be relaxed because child sexual abuse cases, particularly those that are non-violent and occur in the home, may be difficult to discover. Pet.br. 24-25. Even if this largely unsupported claim is accepted as true, it does not support a conclusion that alleged victims should be excused from testifying at trial. Petitioner cannot seriously argue that children will

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<sup>6</sup>Among those claims is an argument that the statement at issue here is somehow similar to a co-conspirator statement. Pet.Br. 26. In light of the fact that co-conspirator statements are spontaneous, made while the conspiracy is in progress, and fall within a well established hearsay exception, Petitioner's argument is without foundation.

somehow learn that they will not be called to the witness stand and, as a result, will reveal that they have been sexually abused.

Petitioner also seeks to chip away at the Confrontation Clause by arguing that hearsay should be admitted because some children, though intellectually capable of testifying, may be too intimidated or fearful<sup>7</sup> to do so. Pet.Br. 25-28. Once again, Petitioner forwards a claim that is irrelevant to this case. At no stage of the proceedings, did the state allege that the declarant could meet the competency standard, but was unable to testify because she was afraid.

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<sup>7</sup>Petitioner, presuming guilt in all cases, ignores the fact that the witness' fear may arise from being required to face the person who is wrongfully accused. See Coy v. Iowa, 108 S.Ct. 2798, 2802 (1988).

Should such a situation arise, there are practical and reasonable solutions far superior to substituting hearsay for live testimony. Familiarizing the child with the courtroom and the personnel, and allowing the presence of a trusted adult are likely to resolve problems of this nature. Regardless, the resolution of that predicament will have to await a case in which such a problem actually occurs.

Petitioner next complains that prosecutors are sometimes unable to introduce out of court statements made by children, citing the excited utterance and medical diagnosis exceptions<sup>8</sup> to the hearsay rule. Rules 803(2,4), Fed. R. Ev.

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<sup>8</sup>The Court has not yet ruled as to the validity of either exception under the Confrontation Clause.

Pet.Br. 30-32. Neither exception is applicable to the statement at issue here.

Simply put, if a statement by any person, child or adult, is not made in a state of excitement, the declaration does not provide the indicia of reliability upon which the exception is based. Similarly, if an individual does not recognize the importance of providing accurate information to a treating physician, the foundation for the medical diagnosis<sup>9</sup> exception, and its reliability,

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<sup>9</sup>It is interesting to note that Petitioner contends that children's statements are often inadmissible because "the child is too young to understand the doctor-patient relationship . . ." Pet.Br. 30. The Solicitor General, on the other hand, writing as Amicus in support of Petitioner, forwards the inconsistent argument that the statement at issue in the present case is reliable because it was made under circumstances resembling the "medical diagnosis" scenario. Brief for the United States, at 18-24.



are absent. The fact that out of court statements may sometimes lack the indicia of reliability that prosecutors want, does not provide a rational basis for lowering the standards of the Confrontation Clause.

Petitioner further solicits the Court to reduce the right of confrontation based upon a claim that in some child sexual abuse cases, it is difficult to obtain a conviction because the alleged victim's report is the only evidence of guilt. Pet.Br. 24-25. Petitioner offers no evidence indicating that there are fewer successful prosecutions of child sex crimes than other crimes. In fact, just the opposite may be true. Many jurors undoubtedly find it difficult to maintain their objectivity when the victim of the charged offense is a child.

More importantly, Petitioner overlooks the fact that the prosecutor's difficulty in proof may arise from the innocence of the accused. Weakening the rights of confrontation and cross-examination carries with it the danger of wrongful conviction, a danger that this Court has battled to prevent for more than two centuries.

The Court must refuse Petitioner's request that it reach far beyond the issues presented by this case to establish new constitutional rules for child sexual abuse prosecutions. In essence, the Court is being asked to reduce the prosecutor's burden in such cases by allowing the presentation of inherently suspect evidence. Such a result is in direct opposition to the search for truth which

lies at the heart of the Confrontation clause.

In the final analysis, the Court's answer to Petitioner's contentions was preordained:

That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.

Coy v. Iowa, 108 S.Ct. at 2802.

C. Petitioner's Proposed "Totality of the Circumstances" Test Would Seriously Impair the Effectiveness of the Confrontation Clause.

This Court has considered the admissibility of hearsay evidence under the Confrontation Clause on numerous occasions. In each such case, The Court

has meticulously examined the applicable hearsay exception and its potential impact on the right of confrontation under the Sixth Amendment. In at least three opinions, it has been stated, "The Court has not sought to map out a theory of the Confrontation Clause that would determine the validity of all . . . hearsay exceptions.'" United States v. Inadi, 475 U.S. at 392, quoting Ohio v. Roberts, 448 U.S. at 64-65, quoting California v. Green, 399 U.S. at 162.

Over the past two decades, the Court has issued decisions which detail the relationship between the Confrontation Clause and two firmly established exceptions to the hearsay rule - prior

testimony<sup>10</sup> and co-conspirator statements<sup>11</sup>. Numerous exceptions that have been in existence since the birth of this nation have yet to be considered by the Court.

Petitioner is seeking to have the Court take a quantum leap far beyond "mapping out a theory". Petitioner asks that the Court take several unprecedented steps. Petitioner calls for a hearsay exception that applies only to a limited class of witnesses. This exception is only to be applied to a specified category of cases. Most disturbing, in applying this exception, the trial courts will not

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<sup>10</sup>Ohio v. Roberts, 448 U.S. at 66;  
Mancusi v. Stubbs, 408 U.S. 204 (1972);  
California v. Green, supra.

<sup>11</sup>Bourjaily v. United States, 107 S.Ct. 2775, 2782 (1987); United States v. Inadi, 475 U.S. at 393-396.

be guided by the centuries of practice and study that can be called upon to ensure fair and even application of the hearsay exceptions contained in the Federal Rules of Evidence and their state counterparts.

The adoption of Petitioner's "totality of the circumstances" plan would force trial judges to devise ad hoc rulings under the Confrontation Clause. Arbitrariness would seriously impede the search for truth. Petitioner recognizes that attempts to expand established hearsay exceptions results in the "destruction of the certainty and integrity of the exceptions." Pet.Br. 31, n.10, quoting State v. Myatt, 697 P.2d 836, 842 (Kan. 1985). The "solution" proposed by Petitioner would be far worse.

The pitfalls that such a "totality of the circumstances" approach represents



extend well beyond prosecutions for child sexual abuse. If such an approach is appropriate for children who are alleged to be victims of such crimes, why should it not apply to all juvenile witnesses? Would it not also be appropriate to extend this newly designed concept to all sexual offenses? The carefully crafted interrelationship between the Confrontation Clause and the hearsay rule, developed through decades of painstaking trial and error, would be in grave danger of extinction.

Petitioner seeks to create an illusion of symmetry, however, by suggesting that the same standard of admissibility be used in child sex cases as is applied under the residual exceptions to the hearsay rules, Rules 803(24) and 804(b)(5), Fed. R. Ev. These

exceptions cannot appropriately be used to create broad exceptions to the right of confrontation or to the rules of evidence.

The drafters of the Rules of Evidence recognized that these residual provisions should be applied "rarely, and only in exceptional circumstances." Senate Committee on Judiciary, Report on Federal Rules of Evidence, 93rd Congress, Second Session Report No. 93-1277, at 19-20 (October 18, 1974). The drafters warned that "an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules." Id. at 19.

Again, Petitioner attempts to draw the Court far beyond the bounds of the issues presented here - the admissibility

of hearsay statements made by an incompetent child and falling within no recognized exception to the hearsay rule. Dissatisfied that some out of court statements by children are unreliable and therefore cannot be admitted either under the Confrontation Clause or the rules of evidence, Petitioner asks this Court to assume a legislative function. Adoption of the evidentiary scheme proposed by Petitioner would strike a crippling blow to the search for truth in our system of criminal justice.

As parents, we fear for the safety of our children; but as a nation, we must fear even more deeply for our childrens' right to live in a society in which a citizen accused of crime receives a fair trial based upon competent evidence. We owe our children that much.

### CONCLUSION

It is respectfully submitted that the Court should rule that certiorari was improvidently granted and remand this matter to the state court without further review. In the alternative, the judgement of the Idaho Supreme Court should be affirmed on the grounds that the admission of hearsay statements of a mentally incompetent witness which do not fall within any established hearsay exception violates the dictates of the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Respectfully submitted,

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